20-0731-cv(L),

20-1009-cv(XAP), 20-1028-cv(XAP)

United States Court of Appeals
for the
Second Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner-Cross-Respondent,

– v. –

KEY FOOD STORES CO-OPERATIVE, INC., 1525 ALBANY AVE MEAT LLC, HB FOOD CORP., PARAMOUNT SUPERMARKETS INC., RIVERDALE GROCERS LLC, SEVEN SEAS UNION SQUARE, LLC, 100 GREAVES LANE MEAT LLC, JAR 259 FOOD CORP.,

Respondents-Cross-Petitioners.

ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD

SPECIAL APPENDIX

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Table of Contents

Page

Decision and Order of the National Labor Relations Board,
Dated October 16, 2019 ..... SPA-1

368 NLRB No. 92 (N.L.R.B.), 2019 L.R.R.M. (BNA) 395185, 2018-19 NLRB Dec. P 16599, 2019 WL 5265170

NATIONAL LABOR RELATIONS BOARD (N.L.R.B.)

SEVEN SEAS UNION SQUARE, LLC AND KEY FOOD STORES CO-OPERATIVE, INC., AND 100 GREAVES LANE MEAT LLC AND KEY FOOD STORES CO-OPERATIVE, INC., AND HB 84 FOOD CORP. AND KEY FOOD STORES CO-OPERATIVE, INC., AND 1525 ALBANY AVENUE MEAT LLC AND KEY FOOD STORES CO-OPERATIVE, INC. AND KEY FOOD CS2, LLC, D/B/A FOOD UNIVERSE AND KEY FOOD STORES CO-OPERATIVE, INC., AND RIVERDALE GROCERS LLC AND KEY FOOD STORES CO-OPERATIVE, INC. AND JAR 259 FOOD CORP. AND KEY FOOD STORES CO-OPERATIVE, INC., AND PARK PLAZA FOOD CORP. AND KEY FOOD STORES CO-OPERATIVE, INC. AND PARAMOUNT SUPERMARKETS INC. AND KEY FOOD STORES CO-OPERATIVE, INC. AND UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 342, AFL-CIO

Cases 29-CA-164058, 29-CA-167245, 29-CA-167319, 29-CA-167327, 29-CA-167400, 29-CA-173762, and 29-CA-180296
October 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND EMANUEL

***1** On February 9, 2018, Administrative Law Judge Benjamin W. Green issued the attached decision. Respondent Key Food Stores Co-operative, Inc. (Key Food) and Respondent Key Food CS2, LLC, d/b/a Food Universe (Key Food CS2) jointly filed exceptions and a supporting brief, and the remaining Respondents (the non-Key Food Respondents) jointly filed exceptions and a supporting brief.[1] The General Counsel filed an answering brief, and the Respondents filed replies in the same combinations as in their exceptions. The General Counsel filed cross-exceptions and a supporting brief, and the non-Key Food Respondents filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions,[2] cross-exceptions, and briefs[3] and has decided to affirm the judge's rulings,[4] findings,[5] and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[6]

In determining whether Respondent Key Food is a joint employer, in separate pairs, with each of the nine individual-store Respondents, the judge applied the standard set forth in *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 365 NLRB No. 156 (2017) (*Hy-Brand I*), in which the Board overruled *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015) (*Browning-Ferris*), affd. in part and remanded in part 911 F.3d 1195 (D.C. Cir. 2018). After the judge issued his decision in this case, the Board vacated its decision in *Hy-Brand I* and declared the overruling of *Browning-Ferris* of no force or effect. See *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*, 366 NLRB No. 26 (2018) (*Hy-Brand II*). Applying *Browning-Ferris*, we agree with the judge's finding that Respondent Key Food is a joint employer with each of the individual-store Respondents.

As more fully described in the judge's decision, Key Food is a co-operative that consists of corporate members, including the individual-store Respondents, that own supermarkets. In a bankruptcy proceeding, Key Food successfully bid on and purchased supermarkets previously owned by The Great Atlantic & Pacific Tea Company (A&P), whose employees were represented by various locals of the United Food and Commercial Workers Union (UFCW) and covered by collective-bargaining agreements. Pursuant to an Asset Purchase Agreement between Key Food and A&P, which was approved by the bankruptcy court, Key Food bound itself to engage in good-faith negotiations for modified collective-bargaining agreements at the newly purchased supermarkets. After its purchase, Key Food assigned ownership of the supermarkets (i.e., sold them) to the individual-store Respondents. Pursuant to purchase agreements between Key Food and the individual-store Respondents, each individual-store Respondent agreed to be bound by any modified agreement "negotiated by Key Food." Key Food's obligation to bargain pursuant to the court-approved Asset Purchase Agreement, and the individual-store Respondents' contractual surrender of bargaining authority to Key Food, is confirmed by the parties' conduct. As the judge found, Key Food exercised near-absolute control over negotiations for a common collective-bargaining agreement, encompassing essential terms and conditions of employment, that would cover employees at all the newly purchased supermarkets and bind the individual-store Respondents.

***2** In agreeing with the judge that Key Food is a joint employer with each of the individual-store Respondents, we also rely on the following evidence. First, the purchase agreements between Key Food and the individual-store Respondents bind the latter to make all offers of employment agreed to on their behalf by Key Food, thus giving Key Food significant control over the scope and identity of each store's initial work force. Second, Key Food referred to itself as an "Employer" (along with individual-store owners whose purchase of supermarkets are not a part of this proceeding) in collective-bargaining agreements it reached with UFCW Locals 338, 1500, and 464, and Key Food was in fact the sole "Employer" signatory to those agreements. Third, the owners of Respondent Albany Avenue, after purchasing that store from Key Food, distributed to employees a handbook entitled "Key Food Rules & Regulations," which referred only to Key Food and not to the individual store or its owners. Finally, Randy Abed, co-owner of Respondents Albany Avenue and Greaves Lane, testified that "he couldn't do anything without the Key Food Cooperative" when the Union asked him directly if they could work out an agreement to end union handbilling at the Albany Avenue and Greaves Lane stores.

Accordingly, as the judge found, Key Food exercised direct and immediate control over essential terms and conditions of employment of the individual-store Respondents' employees. Applying *Browning-Ferris*, we find that this evidence plainly demonstrates that Key Food is a joint employer of those employees.

ORDER

The National Labor Relations Board orders that

A. Respondent HB 84 Food Corp., Howard Beach, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Refusing to hire employees because of their union activities.

(c) Causing a different employer to lay off employees because of their union activities.

(d) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Howard Beach, New York facility.

(e) Unilaterally laying off unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(f) Refusing to reinstate employees who are unlawfully laid off.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

***3** (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Howard Beach, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Before laying off bargaining unit employees for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(c) Make Nelson Quiles whole for any loss of earnings and other benefits suffered as a result of unlawfully causing his layoff and unlawfully refusing to hire him, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, offer Khadisha Diaz, Richard Maffia, and Venus Nepay full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Khadisha Diaz, Richard Maffia, and Venus Nepay whole for any loss of earnings and other benefits suffered as a result of their unlawful layoff, in the manner set forth in the remedy section of the decision.

(f) Compensate Khadisha Diaz, Richard Maffia, Venus Nepay, and Nelson Quiles for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoff of Khadisha Diaz, Richard Maffia, and Venus Nepay, and within 3 days thereafter notify them in writing that this has been done and that the layoffs will not be used against them in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facilities in Howard Beach, New York, copies of the attached notice marked "Appendix A."[7] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in

conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 6, 2015.

***4** (j) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

B. Respondent 100 Greaves Lane Meat LLC, Staten Island, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees because of their union activities.

(b) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Staten Island, New York facility.

(c) Unilaterally laying off unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(d) Refusing to reinstate employees who are unlawfully laid off.

(e) Unilaterally reducing the work days of unit employees without first notifying the Union and giving it an opportunity to bargain.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Staten Island, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Before laying off bargaining unit employees for economic reasons or reducing their work days, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(c) Rescind the unlawful change in the work days of unit employees that was unilaterally implemented in November 2015.

(d) Within 14 days from the date of this Order, offer Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, in the manner set forth in the remedy section of the decision.

***5** (f) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoffs of Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti, and within 3 days thereafter notify them in writing that this has been done and that the layoffs will not be used against them in any way.

(g) Make whole unit employees for any loss of earnings and other benefits suffered as a result of the unlawful reduction in their work days from 6 to 5, in the manner set forth in the remedy section of the decision.

(h) Compensate Debra Abruzzese, Gina Cammarano, Michael Fischetti, Anthony Venditti, and all employees entitled to backpay because of the unlawful reduction in work days for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at their facility in Staten Island, New York, copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 28, 2015.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

C. Respondent 1525 Albany Avenue Meat LLC, Brooklyn, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

***6** 1. Cease and desist from

(a) Maintaining an overly broad rule that prohibits employees from engaging in protected solicitation on nonworking times and in non-working areas and requires employees to report protected activities to management.

(b) Promulgating rules in response to employees' union activities.

(c) Failing and refusing to meet and bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Brooklyn, New York facility.

(d) Laying off or discharging employees because of their union activities.

(e) Unilaterally laying off unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(f) Refusing to reinstate employees who are unlawfully laid off.

(g) Demoting employees, reducing the work hours of employees, and/or reducing the wage rates of employees because of their union activities.

(h) Unilaterally demoting, reducing the work hours, and/or reducing the wage rate of unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Brooklyn, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Before laying off bargaining unit employees for economic reasons, demoting them, reducing their work hours and/or wage rates, or implementing any other-changes in their wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(c) Rescind the unlawful changes in the job classification, work hours and wage rates of unit employees that were unilaterally implemented in January 2016.

(d) Rescind its rules concerning no solicitation, political activity, loitering, and a catch-all disciplinary provision from the employee handbook entitled "Key Food Rules & Regulations." Furnish employees with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

*7 (e) Within 14 days from the date of this Order, offer Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(f) Make Joseph Batiste, Kalvin Harris, Robert Jenzen, and Stephen Fiore whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs or discharge, in the manner set forth in the remedy section of the decision.

(g) Make Robert Jenzen whole for the unlawful reductions in his work hours, in the manner set forth in the remedy section of the decision.

(h) Make Stephen Fiore whole for his unlawful demotion, reduction of wage rate, and reduction of work hours, in the manner set forth in the remedy section of the decision.

(i) Compensate Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the day the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar quarters for each employee.

(j) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoffs, discharge, and reductions of wage rates and hours of Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs and reductions of wage rates and hours will not be used against them in any way.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at their facility in Brooklyn, New York, copies of the attached notice marked "Appendix C."[9] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since November 28, 2015.

***8** (m) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

D. Respondent Seven Seas Union Square, LLC, New York, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to meet and bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their New York, New York facility.

(b) Refusing to hire employees because of their union activity or because the Union engaged in activities on the employees' behalf.

(c) Unilaterally laying off unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(d) Refusing to reinstate employees who are unilaterally laid off.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their New York, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all store employees, including Meat Department Heads, Meat Department employees, Grocery employees, and part-time employees, except Store Managers, Assistant Managers, Guards, Watchmen and all executives and supervisory employees of stores which are located in the Counties of Bronx and Manhattan.

(b) Before laying off bargaining unit employees for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(c) Within 14 days from the date of this Order, offer Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio instatement to the positions they held as employees of The Great Atlantic & Pacific Tea Company or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of this Order, offer Ayanna Jordan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

***9** (e) Make Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to hire them, in the manner set forth in the remedy section of the decision.

(f) Make Ayanna Jordan whole for any loss of earnings and other benefits suffered as a result of her unlawful layoff, in the manner set forth in the remedy section of the decision.

(g) Compensate Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(h) Within 14 days from the date of this Order, remove from their files any reference to the unlawful refusal to hire Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio and the unlawful layoff of Ayanna Jordan, and within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful layoff and refusals to hire will not be used against them in any way.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at their facility in New York, New York, copies of the attached notice marked "Appendix D."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 9, 2015.

***10** (k) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

E. Respondent Key Food CS2, LLC, d/b/a Food Universe, Bayside, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Bayside, New York, facility.

(b) Unilaterally laying off unit employees or otherwise changing their terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

(c) Refusing to reinstate employees who are unilaterally laid off.

(d) Bypassing the Union and dealing directly with unit employees regarding their wages, hours and other terms and conditions of employment.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Bayside, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Before laying off bargaining unit employees for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the above-described bargaining unit.

(c) Upon the Union's request, rescind the severance agreement signed by Mariano Rosado.

(d) Within 14 days from the date of this Order, offer Mariano Rosado full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(e) Make Mariano Rosado whole for any loss of earnings and other benefits suffered as a result of his unlawful layoff, in the manner set forth in the remedy section of the decision.

(f) Compensate Mariano Rosado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

***11** (g) Within 14 days from the date of this Order, remove from their files any reference to the unlawful layoff of Mariano Rosado, and within 3 days thereafter notify him in writing that this has been done and that the layoff will not be used against him in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at their facility in Bayside, New York, copies of the attached notice marked "Appendix E."[11] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since January 3, 2016.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

F. Respondent Riverdale Grocers LLC, Bronx, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Bronx, New York facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Bronx, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
***12** its employees who, in the Counties of New York and Bronx in the City and State of New York, are engaged in the cutting, wrapping and selling of all fresh and smoked meats, poultry, fish and such products customarily handled in the Meat Department, at retail in the Employer's retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Within 14 days after service by the Region, post at their facility in Bronx, New York, copies of the attached notice marked "Appendix F."[12] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 16, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

G. Respondent Jar 259 Food Corp., Glen Oaks, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Glen Oaks, New York facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Glen Oaks, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

***13** (b) Within 14 days after service by the Region, post at their facility in Glen Oaks, New York, copies of the attached notice marked "Appendix G."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 16, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

H. Respondent Park Plaza Food Corp., Glen Head, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Glen Head, New York facility.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Glen Head, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) Within 14 days after service by the Region, post at their facility in Glen Head, New York, copies of the attached notice marked "Appendix H."[14] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 16, 2016.

***14** (c) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

I. Respondent Paramount Supermarkets Inc., Brooklyn and Queens, New York, and Key Food Stores Co-operative, Inc., Staten Island, New York, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Queens, New York facility.

(b) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit at their Brooklyn, New York facility.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Queens, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

(b) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at their Brooklyn, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all Grocery Department and Meat Department employees, including Meat Department Heads and part-time employees, and Pharmacy Department employees except all executives, supervisory employees and Pharmacy managers of stores which are located in the Counties of Nassau, Suffolk, Kings, Queens and the stores located in the Borough of Richmond.

(c) Within 14 days after service by the Region, post at their facilities in Brooklyn and Queens, New York, copies of the attached notice marked "Appendix I."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notice is not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since July 16, 2016.

***15** (d) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. October 16, 2019

John F. Ring
Chairman
Lauren McFerran
Member
William J. Emanuel
Member

1 We will refer to the eight non-Key Food Respondents plus Key Food CS2 collectively as the "individual-store Respondents."

2 The non-Key Food Respondents have requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

3 The non-Key Food Respondents contend that the judge erred in considering the General Counsel's post-hearing brief and failing to rule on their August 21, 2017 Motion to Strike that brief as untimely filed by 3 hours. We find in these circumstances that the judge's consideration of the posthearing brief and his inadvertent failure to rule on the motion did not constitute prejudicial error.

4 The Respondents have excepted to some of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.
Respondents Seven Seas Union Square, LLC, 100 Greaves Lane Meat, LLC, HB 84 Food Corp., and 1525 Albany Avenue Meat LLC have excepted to the judge's denial of their motions at hearing, after the General Counsel presented his case in chief, to dismiss the allegations against them for failure of proof. We have carefully reviewed the record, and we find that the General Counsel in each instance adduced sufficient evidence to establish a prima facie case. We thus find that the judge did not err in denying the motions to dismiss.

5 The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In addition, the non-Key Food Respondents argue that the judge's rulings demonstrate bias against them. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondents' contentions are without merit.
We adopt the judge's finding, for the reasons he states, that the Respondents were "perfectly clear" successors and therefore violated Sec. 8(a)(5) and (1) by unilaterally implementing initial employment terms that differed from the predecessor employer's terms and conditions of employment, including a buyout provision that resulted in the layoff of employees, without first bargaining with the Union to impasse. Accordingly, we need not pass on the judge's additional finding that the Respondents were prohibited from unilaterally implementing their buyout proposal under the principles of *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998). Chairman Ring notes that the judge's ""perfectly clear" successor analysis relied in part on *Canteen Co.*, 317 NLRB 1052 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997). He applies *Canteen Co.* as extant precedent but is open to reexamining it in an appropriate future case.
The Respondents except to the judge's finding that they unlawfully refused to bargain with the Union in violation of Sec. 8(a)(5) and (1), but they do not argue that the judge's recommended affirmative bargaining order is improper if the Board affirms the judge's 8(a)(5) finding. We thus find it unnecessary to provide a specific justification for that remedy. See *Ridgewood Health Care Center, Inc. and Ridgewood Health Services, Inc.*, 367 NLRB No. 110, slip op. at 10-11 fn. 19 (2019). See also *Scepter v. NLRB*, 280 F.3d 1053, 1057 (D.C. Cir. 2002) (in the absence of particular exceptions, the Board may issue an affirmative bargaining order without specifically stating the basis for the order). The General Counsel has cross-excepted to the judge's failure to decide the complaint allegation that Respondent 1525 Albany Avenue Meat LLC unlawfully promulgated employee work rules. Having carefully reviewed the record, we find that the evidence supports the complaint allegation that the Respondent unlawfully promulgated four work rules (no-solicitation, political activity, loitering, and a catch-all disciplinary prohibition) in response to its employees' union activity. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); accord *Boeing Co.*, 365 NLRB No. 154, slip op. at 7 (2017) (new framework for analyzing work rules did not disturb the unlawful promulgation prong of *Lutheran Heritage*). We note that the Respondents' asserted defense to this allegation —— that the General Counsel failed to prove the rules were implemented after the union activity —— is contrary to the record evidence. In view of our finding of unlawful promulgation, we find it unnecessary to pass on the judge's finding that

the rule concerning political activity is unlawfully overbroad, because such finding would not affect the remedy. In addition, the General Counsel has cross-excepted to the judge's failure to decide the complaint allegation that Respondent 1525 Albany Avenue Meat LLC violated Sec. 8(a)(5) and (1) of the Act by unilaterally promulgating a new employee rule book in January 2016. We shall dismiss this allegation, as the General Counsel failed to establish that the rules at issue represented a change in existing terms and conditions of employment.

No exceptions were filed to the judge's dismissal of the allegations that (a) Respondent HB84 Food Corp. violated Sec. 8(a)(3) and (1) of the Act by laying off Venus Nepay, Richard Maffia, and Khadisha Diaz; (b) Respondent Seven Seas Union Square, LLC violated Sec. 8(a)(3) and (1) of the Act by refusing to hire Ricardo Nunez and Jerry Simpson and violated Sec. 8(a)(1) by surveillance or giving the impression of surveillance of employees' protected activity; and (c) Respondent 1525 Albany Avenue Meat LLC violated Sec. 8(a)(1) by maintaining overly broad work rules concerning loitering and a catch-all disciplinary provision. No exceptions were filed to the judge's findings that (a) Respondent 1525 Albany Avenue Meat LLC violated Sec. 8(a)(1) of the Act by maintaining an overly broad no-solicitation rule and (b) Respondent HB84 Food Corp. violated Sec. 8(a)(1) of the Act by interrogating Nelson Quiles.

6 We shall modify the judge's recommended Order to reflect the violations found, and to conform to the Board's standard remedial language and the judge's Feb. 9, 2018 modifications to his recommended Order. We shall substitute new notices to conform to the Order as modified.

7 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

8 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

9 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

10 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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15 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX A

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

***16** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not interrogate you about your union activities.

We will not refuse to hire you because of your union activities.

We will not cause a different employer to lay you off because of your union activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Howard Beach, New York facility.

We will not unilaterally lay you off or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not refuse to reinstate you after you are unlawfully laid off.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit at our Howard Beach, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

We will, before laying you off for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit.

We will make Nelson Quiles whole for any loss of earnings and other benefits resulting from our unlawfully causing his layoff and unlawfully refusing to hire him, less any net interim earnings, plus interest, and we will also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

We will, within 14 days from the date of the Board's Order, offer Khadisha Diaz, Richard Maffia, and Venus Nepay full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will make Khadisha Diaz, Richard Maffia, and Venus Nepay whole for any loss of earnings and other benefits resulting from their unlawful layoff, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

***17** We will compensate Khadisha Diaz, Richard Maffia, Venus Nepay, and Nelson Quiles for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Khadisha Diaz, Richard Maffia, and Venus Nepay, and we will, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

HB 84 Food Corp. and Key Food Stores Co-Operative, Inc.

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not lay you off because of your union activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Staten Island, New York facility.

We will not unilaterally lay you off or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not refuse to reinstate you after you are unlawfully laid off.

We will not unilaterally reduce your workdays or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit at our Staten Island, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, arid such additional classifications previously recognized by the Employer.

***18** We will, before laying you off for economic reasons or reducing your workdays, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit.

We will rescind the unlawful change in your workdays that we unilaterally implemented in November 2015.

We will, within 14 days from the date of the Board's Order, offer Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will make Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti whole for any loss of earnings and other benefits resulting from their unlawful layoffs, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti, and we will, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

We will make whole unit employees for any loss of earnings and other benefits suffered as a result of our unlawful reduction in their workdays from 6 to 5, plus interest.

We will compensate Debra Abruzzese, Gina Cammarano, Michael Fischetti, Anthony Venditti, and all employees entitled to backpay because of the unlawful reduction in workdays for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

100 Greaves Lane Meat LLC and Key Food Stores Co-Operative, Inc.

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

***19** Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not maintain an overly broad rule that prohibits you from engaging in protected solicitation on nonworking times and in nonworking areas and requires you to report protected activities to management.

We will not promulgate rules in response to your union activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Brooklyn, New York facility.

We will not lay you off or discharge you because of your union activities.

We will not unilaterally lay you off or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not refuse to reinstate you after you are unlawfully laid off.

We will not demote you, reduce your work hours, and/or reduce your wage rates because of your union activities.

We will not unilaterally demote you, reduce your work hours, and/or reduce your wage rates or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit at our Brooklyn, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

We will, before laying you off for economic reasons, demoting you, reducing your work hours and/or wage rates, or implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit.

We will rescind the unlawful changes in your job classification, work hours, and wage rates that were unilaterally implemented in January 2016.

We will rescind our rules concerning no solicitation, political activity, loitering, and a catch-all disciplinary provision from our employee handbook entitled "Key Food Rules & Regulations."

We will furnish you with inserts for the current employee handbook that (1) advise that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or we will publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

***20** We will, within 14 days from the date of the Board's Order, offer Joseph Batiste, Kalvin Harris, Robert Jenzen, and Stephen Fiore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will make Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore whole for any loss of earnings and other benefits resulting from their unlawful layoff or discharge, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will make Robert Jenzen whole for the unlawful reductions in his work hours, plus interest.

We will make Stephen Fiore whole for his unlawful demotion, reduction of wage rate, and reduction of work hours, plus interest.

We will compensate Joseph Batiste, Kalvin Harris, Robert Jenzen, and Stephen Fiore for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay awards to the appropriate calendar years for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs, discharge, and reductions of wage rates and hours of Joseph Batiste, Kalvin Harris, Robert Jenzen, and Stephen Fiore, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful layoffs and reductions will not be used against them in any way.

1525 Albany Avenue Meat LLC and Key Food Stores Co-Operative, Inc.

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX D

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our New York, New York facility.

We will not refuse to hire you because of your union activity or because the Union engaged in activities on your behalf.

***21** We will not unilaterally lay you off or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not refuse to reinstate you after you are unlawfully laid off.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit at our New York, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all store employees, including Meat Department Heads, Meat Department employees, Grocery employees, and part-time employees, except Store Managers, Assistant Managers, Guards, Watchmen and all executives and supervisory employees of stores which are located in the Counties of Bronx and Manhattan.

We will, before laying you off for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit.

We will, within 14 days from the date of the Board's Order, offer Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio instatement to the positions they held as employees of The Great Atlantic & Pacific Tea Company or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will, within 14 days from the date of the Board's Order, offer Ayanna Jordan full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

We will make Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio whole for any loss of earnings and other benefits resulting from our unlawful refusal to hire them, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will make Ayanna Jordan whole for any loss of earnings and other benefits resulting from her unlawful layoff, less any net interim earnings, plus interest, and we will also make her whole for reasonable search-for-work and interim employment expenses, plus interest.

We will compensate Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

***22** We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio and the unlawful layoff of Ayanna Jordan, and we will, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful layoffs and reductions will not be used against them in any way.

Seven Seas Union Square, LLC and Key Food Stores Co-Operative, Inc.

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX E

Notice To Employees

Posted by Order of the National Labor Relations Board

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
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Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Bayside, New York facility.

We will not unilaterally lay you off or otherwise change your terms and conditions of employment without first notifying the Union and giving it an opportunity to bargain.

We will not refuse to reinstate you after you are unlawfully laid off.

We will not bypass the Union and deal directly with you regarding your wages, hours and other terms and conditions of employment.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit at our Bayside, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

We will, before laying you off for economic reasons, or before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the above-described bargaining unit.

***23** We will, upon the Union's request, rescind the severance agreement signed by Mariano Rosado.

We will, within 14 days from the date of the Board's Order, offer Mariano Rosado full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

We will make Mariano Rosado whole for any loss of earnings and other benefits resulting from his unlawful layoff, less any net interim earnings, plus interest, and we will also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

We will compensate Mariano Rosado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Mariano Rosado, and we will, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

Key Food CS2, LLC, d/b/a Food Universe and Key Food Stores Co-Operative, Inc.

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX F

Notice To Employees

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Choose not to engage in any of these protected activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Bronx, New York facility.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at our Bronx, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
its employees who, in the Counties of New York and Bronx in the City and State of New York, are engaged in the cutting, wrapping and selling of all fresh and smoked meats, poultry, fish and such products customarily handled in the Meat Department, at retail in the Employer's retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

Riverdale Grocers LLC and Key Food Stores Co-Operative, Inc.

***24** The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX G

Notice To Employees

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Choose not to engage in any of these protected activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Glen Oaks, New York facility.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at our Glen Oaks, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

Jar 259 Food Corp. and Key Food Stores Co-Operative, Inc.,

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX H

Notice To Employees

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Choose not to engage in any of these protected activities.

We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Glen Head, New York facility.

***25** We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at our Glen Head, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement: all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer.

Park Plaza Food Corp. and Key Food Stores Co-Operative, Inc.,

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX I

Notice To Employees

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We will not fail and refuse to bargain with United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Queens, New York facility.

We will not fail and refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in the bargaining unit at our Brooklyn, New York facility.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at our Queens, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
all its employees in its stores herein, engaged in the cutting, wrapping and selling of all fresh and smoked meat, poultry, fish and such products customarily handled in the Meat Department at retail in its retail stores or supermarkets, and such additional classifications previously recognized by the Employer;

We will, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit at our Brooklyn, New York facility concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
***26** all Grocery Department and Meat Department employees, including Meat Department Heads and part-time employees, and Pharmacy Department employees except all executives, supervisory employees and Pharmacy managers of stores which are located in the Counties of Nassau, Suffolk, Kings, Queens and the stores located in the Borough of Richmond.

Paramount Supermarkets Inc. and Key Food Stores Co-Operative, Inc.,

The Board's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Noor I. Alam, Esq. and *Lynda Tooker, Esq.,* for the General Counsel.
Douglas P. Catalano, Esq. and *Scott M. Wich, Esq.,* for the Respondents.
Eric Milner Esq. and *Martin L. Milner, Esq.,* for the Charging Party.

DECISION

BENJAMIN W. GREEN, Administrative Law Judge.

This case was tried before me in Brooklyn, New York, on February 8, 10, 13, 16, 28, 29, March 1, 6, 8, 13, 20, 22, 23, 27, April 5, 6, 17, 26, and 27, 2017. The consolidated complaint issued on September 28, 2016 and the Respondents filed an answer on October 12, 2016.

Complaint Allegations

Respondent Key Food Stores Co-Operative, Inc. (Key Food) is a cooperative that consists of corporate members that own supermarkets. The complaint names nine co-operative member-owners as Respondents who allegedly committed unfair labor practices concerning ten locations. The following Respondent member-owners own supermarkets at the locations listed below:

Key Food Member Owners	Supermarket Location
HB 84 Food Corp (HB)	82-35 153rd Street, Howard Beach, NY
100 Greaves Lane Meat LLC (Greaves Lane)	100 Greaves, Lane, Staten Island, NY
1525 Albany Avenue Meat LLC (Albany Avenue)	1525 Albany Avenue, Brooklyn, NY
Seven Seas Union Square, LLC (Seven Seas)	10 Union Square, New York, NY
Key Food CS2, LLC, d/b/a Food Universe (CS2)	35-10 Francis Lewis Blvd, Bayside, NY
Riverdale Grocers LLC (Riverdale)	566 1 Riverdale Avenue, Bronx, NY

Jar 259 Food Corp. (Jar)	25901 Union Turnpike, Glen Oaks, NY
Park Plaza Food Corp. (Park Plaza)	1-1 Park Plaza, Glen Head, NY
Paramount Supermarkets Inc. (Paramount)	2424 Flatbush Avenue, Brooklyn
Paramount	196-35 Horace Harding Boulevard, Queens

The complaint alleges that Respondent Key Food and each Respondent member-owner, as pairs of joint employers, are liable for certain unfair labor practices. Thus, Respondents Key Food and Seven Seas are alleged to be joint employers at the supermarket located in Union Square, New York, while Respondents Key Food and Greaves Lane are alleged to be a separate pair of joint employers at the supermarket located on Greaves Lane.[1]

The complaint alleges that the Respondents purchased the supermarkets from and were successors of The Great Atlantic & Pacific Tea Company (A&P). A&P employees were represented by a number of United Food and Commercial Workers Union (UFCW) locals, including the Charging Party Union, UFCW, Local 342, AFL-CIO (the Union or Local 342).

The substantive allegations are as follows:

All of the Respondents are alleged, since July 7, 2016, to have refused to meet and bargain with the Union as the representative of appropriate units of A&P employees.

Respondent HB allegedly caused A&P to layoff meat manager Nelson Quiles and then refused to hire him in violation of Section 8(a)(3) and (1). Respondent HB is also alleged to have unilaterally and discriminatorily laid off Richard Maffia, Venus Nepay, and Khadisha Diaz in violation of Section 8(a)(5), (3), and (1). Finally, Respondent HB, by Frank Almonte, allegedly violated section 8(a)(1) by interrogating employees regarding their union activities.

Respondent Greaves Lane is alleged to have unilaterally laid off and refused to reinstate Gina Cammarano, Debra Abruzzese, Michael Fischetti, and Anthony Venditti in violation of Section 8(a)(5) and (1). The layoff of Venditti is also alleged as a violation of Section 8(a)(3) and (1). Further, Respondent Greaves Lane is alleged to have unilaterally reduced the work days of all unit employees by changing their schedules from six to five days per week in violation of Section 8(a)(5) and (1).

Respondent Albany Avenue is alleged to have unilaterally laid off and refused to reinstate Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore in violation of Section 8(a)(5) and (1). Before Fiore and Jenzen were laid off, Respondent Albany Avenue is alleged to have unilaterally reduced the work hours of Fiore and Jenzen and demoted Fiore with a corresponding reduction in his wage rate in violation of Section 8(a)(5) and (1). Fiore's layoff, demotion, reduction of wage rate, and reduction of hours are alleged as violations of Section 8(a)(3) and (1) as well. Respondent Albany Avenue is also alleged to have issued an employee rule book with overly broad provisions regarding solicitation, politics, loitering, and a catch-all disciplinary provision in violation of Section 8(a)(1).

Respondent Seven Seas is alleged to have discriminatorily refused to hire the following employees in violation of Section 8(a)(3) and (1): Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Lucy Maldonado, Ricardo Nunez, Maria Ortega, Elena Pagan, Rosa Silverio, Jerry Simpson, and Natalie Tirado.[2] Respondent Seven Seas is also alleged to have unilaterally laid off and refused to reinstate Ayanna Jordan in violation of Section 8(a)(5) and (1). By Pat Conte, Respondent Seven Seas allegedly engaged in surveillance or created the impression of surveillance by using his phone as a camera during the hearing in this matter in violation of Section 8(a)(1).

Respondent CS2 is alleged to have unilaterally laid off and refused to reinstate Mariano Rosado and dealt directly with employees by asking Rosado to sign a severance agreement in violation of Section 8(a)(5) and (1).

Summary of Conclusions of Law

For the reasons described at greater length below, I find and conclude that the Respondents are successors and joint employers as alleged in the complaint, and violated the Act as follows:

Section 8(a)(1): Respondent HB, by Frank Almonte, interrogated employees regarding their union activities. Respondent Albany Avenue implemented overbroad work rules regarding solicitation and politics.

Section 8(a)(3) and (1): Respondent HB caused A&P to layoff Quiles and then refused to hire him. Respondent Greaves Lane laid off Venditti. Respondent Albany Avenue laid off, demoted, and reduced the hours of Fiore. Respondent Seven Seas refused to hire Colon, Diaz, Fields, Gomez, Iturralde, Jones, Ortega, Pagan and Silverio.

Section *8(a)(5) and (1)*: All of the Respondents failed and refused to resume bargaining with the Union in July 2016. Respondents HB, Greaves Lane, Albany Avenue and CS2 unilaterally laid off the employees named in the complaint. Respondent Greaves Lane unilaterally reduced the number of weekly work days of unit employees from six to five. Respondent Albany Avenue unilaterally reduced the work hours of Fiore and Jenzen, and unilaterally demoted Fiore with a corresponding reduction in his wage rate. Respondent CS2 unlawfully bypassed the Union and dealt directly with employees by requesting that Mariano Rosado sign a severance agreement.

I do not find that the General Counsel established violations with regard to the following allegations: Respondent HB laid off Diaz, Maffia, and Nepay in violation of Section 8(a)(3) and (1). Respondent Seven Seas refused to hire Maldonado, Nunez, Simpson, and Tirado in violation of Section 8(a)(3) and (1). Respondent Seven Seas engaged in surveillance of employees' protected activities or created the impression that employees' protected activities were under surveillance in violation of Section of 8(a)(1). Respondent Albany Avenue rules regarding loitering and a catch-all disciplinary provision were overly broad in violation of Section 8(a)(1).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the posthearing briefs that were filed by the parties, I make these

Findings of Fact

i. jurisdiction

In their answer to the complaint, each of the Respondents admitted jurisdiction as follows: Annually, Respondent Key Food purchased and received at its Staten Island, New York facility products, goods and materials valued in excess of $50,000 directly from points outside of the State of New York. The Respondents Seven Seas, HB, Albany Avenue, CS2, JAR, Riverdale, Park Plaza and Paramount were projected to derive gross revenues in excess of $500,000, and purchased and received at their respective facilities products, goods and materials valued in excess of $5000 directly from points located outside the State of New York. At all material times, each of the Respondents has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

ii. alleged unfair labor practices

Respondent Key Food and the A&P Bankruptcies

Respondent Key Food consists of about 110 corporate members that own about 240 supermarkets. [Tr. 2426.] The Respondent members-owners listed below are owned by the following individuals or Respondent Key Food itself [Jt. 6]:[3]

Respondent Member-Owners	Individual Owners
Seven Seas	Paul and Pat Conte
Greaves Lane	Randy and Sam Abed
Albany Avenue	Randy and Sam Abed
HB	Frank and Gilbert Almonte
CS 2	Key Food
Riverdale	Jamie and Ruben Luna
Jar	Alvin and Jose Diaz
Park Plaza	Leonard Mandell
Paramount	Joseph Vederosa

A&P was a large supermarket chain that operated stores in the New York area under various banners, including Food Emporium, Pathmark and Waldbaums. [Tr. 1694] [Jt. 1]. A&P and its banners had collective-bargaining agreements with a number of UFCW locals, including Locals 342, 338, 464A, and 1500. Local 342 largely represented "back wall" employees in the meat, seafood and/or deli departments. However, Local 342 also represented some wall-to-wall units consisting of all store employees. The bargaining units at issue here are described in collective-bargaining agreements between A&P or its banners and the Union, which were entered into the record as follows:

Individuals	Unit	A&P Contract
Seven Seas	Wall-to-Wall	The Food Emporium [GC 3]
Greaves Lane	Meat, Deli, Seafood	Pathmark Stores, Inc. [GC 4]
Albany Avenue	Meat, Deli, Seafood	Pathmark Stores, Inc. [GC 4]
HB	Meat, Deli, Seafood	Pathmark Stores, Inc. [GC 4]
CS 2	Meat and Seafood	Waldbaums Supermarkets, Inc. [GC 5]
Riverdale	Meat and Seafood	Food Emporium (Retail Industry Agreement New York Division) [GC 6]
Jar	Meat and Seafood	Waldbaums Supermarkets, Inc. [GC 5]
Park Plaza	Meat and Seafood	Waldbaums Supermarkets, Inc. [GC 5]
Paramount (Queens)	Meat and Seafood	Waldbaums Supermarkets, Inc. [GC 5]

Paramount (Queens)	Wall-to-Wall	A&P [GC 7]

Some of the Union's contracts (e.g., Food Emporium [GC 3] and A&P [GC 7]) contained a severance provision that provided for employees hired before a certain date to receive $800 per year in severance upon the closing of the store without a cap on the number of years.

A&P went through bankruptcy proceedings in 2010 and 2015. The first bankruptcy in 2010 was a reorganization in which the Union agreed to modify and extend its collective-bargaining agreements with certain cost saving concessions. [Jt. 2] [GC 8] [Tr. 68-72]. Union Secretary Treasurer Lisa O'Leary estimated the monetary value of concessions to be about $70 million. Among these concessions, the bankruptcy order effectively reduced severance for those employees who were entitled to $800 per year of service upon closure of a store to $400 per year of service. [Jt. 2] [Tr. 1709-1710].

The second bankruptcy in 2015, as described in greater detail below, was a liquidation in which A&P stores were put up for bid and purchase. The Union participated in this bankruptcy process. [Tr. 52, 192.] The Respondents stipulated that the stores they purchased through the second A&P bankruptcy continued to operate as supermarkets and that a majority of the employees who were employed in each of the A&P units listed above were hired to work in the Respondents' stores. [Jt. 6.]

By participating in a cooperative, individual member-owners realize cost savings through economies of scale in purchasing, sales, marketing, merchandising, and advertising. [Tr. 2427, 2432.] Thus, Respondent Key Food sought to purchase as many A&P stores as possible in order to maximize market volume and economies of scale. [Tr. 2439-2400.] Respondent Key Food sent information to its member-owners about the A&P stores that were being sold and held a meeting with them to discuss the process of purchasing those stores in bankruptcy. Approximately 35 member-owners expressed interested in purchasing one or more A&P stores. [Tr. 2437-2438.] Respondent Key Food held an internal bidding process among its members to determine which members would obtain the purchasing rights for which stores. The more individual members were willing to pay the more likely it was that Respondent Key Food would make a successful bid on the stores in bankruptcy. [Tr. 2439.]

Ultimately, Respondent Key Food successfully bid on 16 A&P stores, including the 10 referenced in the complaint. The internal process to determine which member-owners would purchase each particular store took several months and was not concluded until October (shortly before the stores transitioned from A&P to Key Food ownership). [Tr. 2444-2445, 2452-2453.]

On July 19, 2015,[4] Respondent Key Food and A&P entered into an Asset Purchase Agreement (APA) for the purchase of certain stores. [Jt. 3 p. 2.] The APA includes the following provisions:
Section 2.4 Closing. The closing of the transactions contemplated by this

Agreement (the "Closing") shall take place at the offices of Weil, Gotshal & Manges LLP located at 767 Fifth Avenue, New York, New York (or such other location as shall be mutually agreed upon by Sellers and Buyer) commencing at 10:00 a.m. local time on a date (the "Closing Date") that is the third (3rd) Business Day following the date upon which all of the conditions to the obligations of Sellers and Buyer to consummate the transactions contemplated hereby set forth in Article VII (other than conditions that by their nature are to be satisfied at the Closing itself, but subject to the satisfaction or waiver of those conditions) have been satisfied or waived, or on such other date as shall be mutually agreed upon by Sellers and Buyer prior thereto. For purposes of this Agreement and the transactions contemplated hereby, the Closing will be deemed to occur and be effective, and title to and risk of loss associated with the Acquired Assets, shall be deemed to occur at 12:01 am, New York City time, on the Closing Date. [Jt. 3, p. 17.]

. . .

ARTICLE VI

OTHER COVENANTS

. . .

Section 6.3 Treatment of Affected Labor Agreements. With respect to Covered employees under an Affected Labor Agreement, Buyer shall either (a) agree to assume the Affected Labor Agreement without modification and thereafter comply with the obligations set forth in Section 6.4 with respect to Covered Employees under such assumed Affected Labor Agreement or (b) engage in good faith negotiations, in coordination with Sellers, toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions and to enter into a Modified Labor Agreement with each of the Affected Unions. Buyer may, at any time prior to the Sale Hearing, agree to have an Affected Labor Agreement assigned to it without modification by providing notice of such agreement to Sellers and the applicable Affected Union. Upon the commencement of the Bankruptcy Cases, to the extent Buyer is not assuming the Affected Labor Agreements, Buyer, in coordination with Sellers, shall propose a Modified Labor Agreement on a Store-by-Store basis to each Affected Union (each, a "Proposal"), which Proposal may be modified as a result of Buyer's and/or Sellers' good faith negotiations with the Affected Unions. Buyer agrees to cooperate with Sellers in providing each Affected Union with complete and reliable information to allow the Affected Unions to evaluate the Proposal. For all purposes under this Section 6.3, Buyer acknowledges the requirements of sections 1113 and 1114 of the Bankruptcy Code and agrees to use good faith reasonable best efforts to cooperate with Sellers in ensuring compliance with any applicable provisions thereof.

Section 6.4 Covered Employees.
(a) Obligations of Buyer. With respect to Covered Employees who are represented by an Affected Union and are legally authorized to work in the capacity in which they were employed immediately prior to the Closing ("Affected Union Covered Employees"), at least ten (10) days prior to the Closing Date, Buyer shall make an offer of employment, which shall be effective as of the Closing Date and contingent upon the Closing, and shall be consistent with the terms and conditions required by the governing Affected Labor Agreements or Modified Labor Agreements, to the extent applicable. With respect to any Affected Union Covered Employee who is on a long-term disability leave of absence as of the Closing Date, such offer shall be contingent upon such Affected Union Covered Employee returning to active status within a period of six months following the Closing. Notwithstanding the foregoing, nothing herein shall be construed as to prevent Buyer from terminating the employment of any Covered Employee, consistent with applicable law and the governing Affected Labor Agreements or the Modified Labor Agreements, as applicable, at any time following the Closing Date. Buyer shall have no obligation with respect to any Covered Employee, including making any offer of employment to any such Covered Employee, who, as of immediately prior to the Closing, is not represented by an Affected Union. [Jt. 3, p. 38-39.]

The APA also provides in Article 7 as a condition of closing that the buyer and seller perform and comply with their covenants and agreements under the APA (e.g., the covenants in Article 6). [Jt. 3, p. 42-43.]

On July 20, A&P filed a motion in bankruptcy court for approval of various purchase agreements, including the APA with Key Food. The APA was attached and submitted with this motion as Exhibit E. [Jt. 1.] The motion states, with regard to A&P's agreement with Key Food [Jt. 1, p. 12]:
Treatment of Affected Labor Agreements. With respect to Covered Employees under an Affected Labor Agreement, the Stalking Horse Bidder shall either (a) agree to assume the Affected Labor Agreement without modification or (b) engage in good faith negotiations, in coordination with Sellers, toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions and to enter into a Modified Labor Agreement with each of the Affected Unions.

Key Food Chief Financial Officer Sharon Konzelman testified that Key Food had until August 7 to drop stores from the purchase for environmental reasons or to vacate the entire transaction if financing could not be obtained. However, after August 7, Respondent Key Food was bound by the bid, which would be executed unless they were outbid by a competitor. Further, it was Respondent Key Food's intention to hold each member-owner to its obligation to purchase the stores they successfully bid upon. [Tr. 2526-2527.]

On September 30, the APA was amended. The amended APA revised 6.4(a) to require a buyer to make offers of employment to "substantially all" (as opposed to all) employees and, if no labor agreement was in effect, base those offers on the Respondents' "last best offer" in negotiations with incumbent unions who represented A&P employees. Section 6.4(a), as amended, reads in its entirety as follows [Jt. 3, p. 87]:

"At least ten (10) days prior to the Closing Date, Buyer shall make an offer of employment to substantially all Covered Employees who are represented by an Affected Union and are legally authorized to work in the capacity in which they were employed immediately prior to the Closing ("Affected Union Covered Employees"). Such offer of employment shall be effective as of the Closing Date and contingent upon the Closing, and shall be consistent with the terms and conditions required by the governing Affected Labor Agreements or Modified Labor Agreements, if any, that may then be in effect. If no Affected Labor Agreements or Modified Labor Agreements are in effect, the offer of employment to Affected Union Covered Employees will be on terms as are reflected in Buyer's last best offer (the "Employment Offer"). With respect to any Affected Union Covered Employee who is on a long-term disability leave of absence as of the Closing Date, such offer shall be contingent upon such Affected Union Covered Employee returning to active status within a period of six (6) months following the Closing. Notwithstanding the foregoing, nothing herein shall be construed as to prevent Buyer from terminating the employment of any Covered Employee, consistent with applicable Law and the governing Affected Labor Agreements or the Modified Labor Agreements, if any, that may then be in effect, or if no Affected Labor Agreements or Modified Labor Agreements are in effect, the Employment Offer. Buyer shall have no obligation with respect to any Covered Employee, including making any offer of employment to any such Covered Employee, who, as of immediately prior to the Closing, is not represented by an Affected Union."

Once Respondent Key Food purchased the assets of the A&P stores, it entered into asset purchase agreements with the member-owners, which served to assign the stores to the member-owners for the purchase price. Respondent Key Food provided financing in the form of loans to member-owners of 70 percent of the purchase price. [Tr. 2453-545.] Each of the asset purchase agreements contained the following provisions [Jt. 9]:

Section 5.4 Modified Labor Agreements. Member acknowledges that pursuant to Section 6.3 of the A&P Asset Purchase Agreement, Key Food is obligated to engage in good faith negotiations, in coordination with A&P, toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions and to enter into a modified Labor Agreement with each of the Affected Unions. Member hereby agrees to be bound by any such Modified Labor Agreement that is negotiated by Key Food or make any offers of employee [sic] as required by the A&P Asset Purchase Agreement.

Section 7.10 Member's Representative. Member hereby irrevocably constitutes and appoints Key Food as its true, exclusive and lawful agent and attorney-in-fact to act in the name, place and stead of Member in connection with the transactions contemplated by the A&P Asset Purchase Agreement, in accordance with the terms and provisions of the A&P Asset Purchase Agreement, and to act on behalf of Member in any action, suit or proceeding involving the A&P Asset Purchase Agreement, to do or refrain from doing all such further acts and things, and to execute all such documents as Key Food shall deem necessary or appropriate in connection with the transactions contemplated by the A&P Asset Purchase Agreement. Key Food will incur no liability to Member with respect to any action taken or suffered by any party in reliance upon any notice, direction, instruction, consent, statement or other document believed by Key Food to be genuine and to have been signed by the proper person (and Key Food shall have no responsibility to determine the authenticity thereof), nor for any other action or inaction, except its own gross negligence, bad faith or willful misconduct.

On October 21, United States Bankruptcy Judge Robert Drain entered an order approving the amended APA. [Jt. 3.] The order included statements to the effect that interested parties were notified and given an opportunity to object to the sale. In particular, paragraph Z of the order states as follows [Jt. 3, pp. 11-12]:

No Breach of Union Obligations. The unions affected by the sale of the Acquired Assets did not file an objection to such sale and have waived their rights to assert against any of Buyer, the Debtors, the Debtors estates, or any other party any claims or other rights arising under the successorship provisions of any collective bargaining agreement or similar agreement in relation to such sale.[5]

Negotiations from July 28 to November 13

Respondent Key Food and the UFCW Locals that represented A&P employees began negotiating for modified collective-bargaining agreements on July 28. [Tr. 73] [GC 9]. UFCW Regional Director Tom Clark was present during the first bargaining session. [Tr. 74.] Additional bargaining sessions were held between the Respondents and one or more of the Locals on July 29, August 3, 26, September 17, 21, 23, 24, 25, October 12, 14, 19, 21, November 13 and 19. Notes of those bargaining sessions were entered into evidence. [GC 10, 13, 15, 49, 50, 51, 53, 73, 75, 76][R. 12-15, 17-19, 22-23, 30].

The Respondents' Attorney Douglas P. Catalano acted as the lead negotiator for all the Respondents and Konzelman also attended all the bargaining sessions. Among the individual store owners, Pat Conte (Seven Seas) and Leonard Mandell (Park Plaza) were selected to be on the Respondents' bargaining committee because they had previous experience dealing with UFCW Locals. [Tr. 2077, 2244.] Bargaining sessions were also attended intermittently by other owners of the stores.

From July to September, bargaining sessions were attended by representatives of multiple UFCW Locals, including Locals 342, 338, 464A, and 1500. In October, Local 342 began bargaining with the Respondents individually (largely without the other UFCW locals or the international). [Tr. 91.] Local 342 did not have a representative who attended every bargaining session or a single lead negotiator. [Tr. 1378.] Many A&P stores were being sold or closed during the 2015 bankruptcy and union representatives were spread thin attempting to negotiate contracts and address concerns of A&P unit employees. [Tr. 1110-1112, 1114, 1378.] Union President Richard Abondolo acted as the lead negotiator for the Union when he was present at bargaining sessions, but Abondolo did not attend all of the negotiations. [Tr. 104.] When Abondolo was not present, bargaining sessions were led by O'Leary or Executive Director Lou Solicito. Union Director of Contract Negotiations Louis LoIacono and Executive Director Stephan Boras also attended bargaining sessions. The Union had at least one administrative assistant present at each bargaining session to take notes. The union negotiators did not take their own notes. [Tr. 82, 100-102, 948-949.]

On July 28, Catalano indicated that the Respondents wanted to reach agreement as soon as possible and that the substance of the agreement could impact how many stores were purchased. Catalano also said the failure to reach an agreement could result in Key Food not purchasing stores at all. Catalano emphasized that the Respondents wanted the agreement to include a 401(k) plan instead of a multi-employer pension plan, limits on health and welfare contributions, reduced wages for individuals making $15 per hour or more, involuntary buyouts of A&P employees not retained by the purchaser, and a long-term contract (preferably 4 years). The parties discussed arbitration, union time, and a system of transferring employees between stores. Catalano asserted that the A&P contracts were part of a "failed model" that resulted in A&P declaring bankruptcy twice in five years. The Locals rejected this assertion, claiming that other stores with contracts similar to A&P's have been viable. The Locals insisted that A&P went bankrupt because of poor management. Nevertheless, the Locals did not rule out any of the terms the Respondents were proposing and asked Catalano to put them in writing. The Locals also insisted that the Respondents reach an agreement with all of them before a contract with any of them would go into effect. [GC 29] [Tr. 73-78, 194-202, 206-211, 1737-1740, 2079-2083].

On July 29, Catalano presented the Respondents' first written proposal to representatives of Locals 342, 338, and 1500. [R. 3.] The proposal called for wage and leave reductions, a 12-month probationary period with the right to terminate or reclassify any full-time employee to part-time without cause, a framework for offering healthcare coverage or cash in the alternative, a

minimum of 16 hours for part-time employees, arbitrations conducted by the American Arbitration Association (AAA), 401(k) plans with contributions and matching by the employers (rather than a traditional multi-employer pension plan), no requirement to employ department heads (except for a meat manager if the store averaged a weekly volume of $500,000), and a buyout provision allowing employers to "buyout the service" of any employee for a specific sum depending on the employee's years of service.[6]

During the July 29 bargaining session, Catalano admitted that the proposal would need to be supplemented in order to finalize complete agreements with all the Locals. However, the Respondents wanted an agreement on major items for the purpose of getting approval of the sale by the Bankruptcy Court. Union notes of the July 29 bargaining session state [GC 53]:
RA: How much do you say we have time wise to get this done, days, weeks?

Sharon: Days, we have to sell this to the members.

RA: So narrow it down. Don't fatten it up. There are some numbers we can say yes to. So let's get down to the real #'s and points where we can sit down. You have 18 items on 1 sheet. It's going to be a long time. It depends on you, your people, want to throw away. Some of this doesn't even belong in here, it's fluff, crap. Probationary periods.

The Locals did not agree to the Respondents' first proposal or that concessions were appropriate. According to union notes, Abondolo stated that meat department employees "are cheaper and 4 years behind" (presumably the result of concessions agreed to during the 2011 bankruptcy), and "[s]o we don't understand why they would have to make the cuts when they're already lower." The Locals also expressed concern that agreeing to concessions for the A&P stores would undercut its more expensive contracts in the industry, including contracts with other Key Food stores. The parties discussed the fact that certain prospective purchasers were owners of nonunion stores and hesitant to buy a store that is unionized. [GC 53] [Tr. 1881].

On August 3, the same parties met and the Locals presented a counter proposal. The Locals tentatively agreed to a 42-month contract, a minimum full-time rate of $11 per hour, and a minimum of 16 hours per week of part-time employees. The Locals' proposal also indicated that they were "seemingly ok" with reclassification of full-time employees to part-time at the same wage and with the same holidays and vacation. The Locals proposed employment for all A&P employees unless an employee decided not to take the offer of employment, which would trigger severance of an amount (not yet specified) more than what the employer was currently willing to offer as a buyout. The Locals' proposal indicated that any reduction in pay would be opposed, but a reduction of the number of employees in the store could be discussed. The proposal indicated that stores would have a minimum of three department managers (perishable, meat and assistant) with the addition of one department manager if store volume exceeded $350,000 and the addition of two department managers if store volume exceeded $400,000. Local 342 wanted to keep its usual panel of arbitrators instead of using AAA. [GC 73] [R. 15-16] [Tr. 1968-1974, 1744-1759].

On August 26, the Locals presented the following written counter-proposal [GC 11]:
1-All current A&P employees shall be offer employment with the new employer, with a 30 day trial period.

2-Term of the contract 42 months

3-All stores must have a minimum of three department heads, meat perishable and grocery. All stores doing $400,000 a week in sales for a period of two months or more must have a minimum of 4-5 department heads depending on if they have a bakery department.

4-All current A&P departments who are not to be department heads in the new company will be offered full time employment at a rate of pay equal to their rate of pay had they been a full time clerk for A&P.

5-All current full time clerks will be offered full time employment at their current rate.

6-All Current Part time clerks shall be offered employment at their current rate of pay.

7-Six months after hired each Ft member shall receive a .50 cent an hour increase and every 6 months thereafter for the term of the contract.

8-Six months after hire, each Pt member shall receive a .35 cent an hour increase and every 6 months thereafter for the term of the contract.

9-All FT and all PT members shall retain their current holidays, sick and vacation time.

10-The Employer shall contribute $250.00 per month for each FT member and $75.00 for each PT member per month toward an established Annuity or 401K plan set up by the union.

11-The employer shall contribute on behalf of each FT member to an ACA approved FT health care plan the sum of $1100.00 per month for a family plan and $500.00 a month for a single plan, subject to a 5% increase each year of the contract. [¶] The employer shall offer an Opt-Out bonus to the members; upon proof of ACA acceptable coverage each FT will get a check $3500 each year that they Opt-out. [¶] The Employer shall contribute $60.00 per month to the Benefit/Health or Ancillary Fund of the union on behalf of each Pt member

12-All new hires shall have a 60 day trial period

13-All current Pt members are guaranteed a minimum of 20 hours a week

14-All current A&P members hired during the sale of the A&P shall receive 6 weeks severance pay and 3 months of COBRA should they fail to make their trial period (not self-terminated), be laid off or terminated due a store closing or lack of business during the term of the contract.

15-All Current members shall maintain their current Sunday rate during the term of the contract.

16-Minimum Hire rate for new FT. clerks is $11.00 hour, Minimum hire rate for new Pt. clerks shall be 35 cents above the current minimum wage, however should the minimum wage be increased there shall always be a minimum of a .35 cent difference in pay. All new Ft and Pt clerks after their trial period shall receive raises according to the above schedule in #s 6&7.

17-Grievance and arbitration procedure. Arbitrations shall be heard before a mutually acceptable panel of arbitrators or AAA as agreed upon by the employer and the Union.

18-Should the employer close for renovation current Ft and Current Pt members of each bargaining unit shall be given the right of first refusal before the employer hires any new employees.

19-All other terms and conditions of the current A&P contract not listed this MOA shall remain in effect for the term of this contract.

20-The unions reserve the right to add or to modify these proposals.

At this bargaining session, Abondolo objected to discretionary layoffs during a probationary period without some showing by the employer that the layoffs were justified by a lack of business. He also objected to a reduction in employees' rate of pay. Local 1500 President Tony Spielman said “take 10% off the top” (apparently referring to a reduction in pay), but Abondolo confirmed

that Local 342 would not accept a pay cut. Abondolo also voiced some objection to the particular individuals who were looking to purchase the stores. According to the notes, Abondolo said, "[t]hese are the same guys who have had us arrested, gets physical with us, tells us to go fuck ourselves and now you want us to discount these people so they can spit on us. Those are the people you represent. They threaten the people in the stores, it's just not going to happen." In response to this and other objections to prospective nonunion owners, Catalano countered that it was good to bring nonunion owners into the union fold. After caucuses, the Locals proposed that the Respondents simply adopt the A&P contracts for 1 year. Catalano declined. [GC 10.]

On September 14, the Locals received an email forwarded to them from A&P, which contained a letter from Konzelman to A&P. [GC 12.] The letter stated in part, "[p]ursuant to Section 6.4 of the Asset purchase agreement dated July 19, 2015 ..... I am writing to convey offers of employment to each current employee of A&P or any of its subsidiaries represented by UFCW Local 1500, UFCW Local 1245, UFCW Local 342 and UFCW Local 338. . . ." The letter also stated that "[t]he terms of employment will be as set forth in Key Food's September 8, 2015 written proposal to the UFCW Locals listed above (a copy of which is appended hereto as *Exhibit* B) or as may otherwise be agreed upon by Key Food and the respective union representatives."[7]

On September 17, the Respondents held a bargaining session with Locals 338 and 1500. Local 342 was not present. According to Catalano and Konzelman, the parties reached an agreement with Locals 338 and 1500, which was later revised on September 22 at the request of Local 338 President John Durso. [R. 5, 6, 18, 20][Tr. 1773-1786, 1975, 2461-2465, 2468, 2562].

On September 21, the Respondents held their last bargain session with multiple locals, including Locals 342, 338 and 1500. According to union notes, Abondolo questioned the Respondents about discretionary buyouts without regard to seniority and without recall rights. Abondolo asked if the new owners knew which employees they were going to keep, and Catalano answered that the owners probably did not yet know. Ultimately, Abondolo rejected any proposal that included layoffs, a reduction in pay, or a reduction in paid time off. With regard to healthcare contributions, Abondolo proposed that the parties adopt the provision in the Union's other Key Food contracts. [R. 21] [Tr. 1796-1797, 1982-1985].

On September 22, Catalano sent the locals the following proposal (referred to on the record as the Durso proposal because it was "revised 9/22/15 per Durso email") [R. 20]:[8]

1. Offer of employment will be made to all current union A&P employees without qualification or interview, subject to a possible buy-out by Key Food before or after their employment commences, per the terms of #14. Offer voluntary first, if not enough volunteers, then involuntary, based on seniority. Any employee bought out involuntarily will have recall right at full rate of pay for 1 year.

2. Term of agreement is 42 months, commencing upon the date that the employees are hired and begin employment with the Key Food member.

3. A full-time employee is guaranteed an offer of 40 hours per week.

4. Wages:

a. All employees who earn $21.00/hour or less shall be hired at the same rate of pay
b. Any employee earning $23.01 or more shall be offered a position at a rate 10% less than his or her current rate, but the new rate shall not be less than $23.00/hr. Wage progression for FT employees hired from A & P:

6 months after contract $35/week

12 months after 1st increase; $35 per week

12 months after 2nd increase: $35 per week

6 months later $2,000 bonus lump sum payment (subject to FICA withholdings only)

c. Minimum FT rate for new hires: $12.00/hour/ upon entry to union $0.50 per hour increase. On each anniversary date of hire $35/week, until the end of the contract.

d. New part time employees will be hired at minimum wage, and will receive a $0.50/hour increase after 30 days. Then on each anniversary date of hire $0.50/hour increase.

e. Wage progression for part timers hired from A & P: $0.40 an hour after 6 months, then 1 year later $0.40/hour, 1 year later $0.40/hour, year later $0.40/hour, then a onetime $1000 bonus. (subject to FICA withholding only)
5. Probationary period:

Each employee hired shall be on probation for the first 30 days of his/her employment, but the probationary period may be extended for an additional 30 days upon mutual agreement. Employee may be terminated at any time during the probationary period with or without cause, but full time employees hired from A & P, and who are terminated without cause prior to the end of the probationary period shall be provided with a payment of $6,000 $8,000 together with 3 months of continued medical coverage.

6. Health and Welfare:

a. Only for 338, other locals to be negotiated: Part time: Those part time employees who perform 30 hours or more of service per week will be offered healthcare by the employer with a $400/month employer contribution; and $20 per week employee contribution to the appropriate ACA compliant H&W plan. Full time: Employer contribution of $1,000 per employee.

Increases in these rates will be capped at 5% per year.

b. If an A&P employee performing 30 hours of service or more is offered healthcare, but declines healthcare, and shows proof of ACA coverage elsewhere, a onetime opt-out payment of $3000 will be given.

c. “Special part-timers” (local 1500, current A & P employees, who currently receive union-provided H & W) will be offered ACA compliant H&W, with an employer contribution of $400/month, and an employee contribution of $15/week

d. New Hires eligible for coverage will be offered coverage on day 90 of employment; existing A&P employees will get covered day one.

e. PT benefit contributions of $70 for local 338 and $76 (approx.) for local 1500 (under 30 hours)

7. Minimum guaranteed part time hours per week will be 20 hours, subject to employee availability.

8. A mutually agreed upon arbitrator, or if no agreement, the American Arbitration Association shall be the forum for all arbitration proceedings.

9. 401-K or other defined contribution by the employer of $200/month will be made for all FT employees

a. All Part-timers hired from A&P will receive $75 per month contributed to a 401K or other defined contribution plan.

b. New hire employees will be eligible to participate in the plan after 1 year of employment. Existing A&P employees will be eligible day one of employment.

10. Vacation, Sick Personal, Holiday and Sunday premium: grandfather benefits for A&P hires except for personal days which will be a maximum of 4; and sick days which will be a maximum of 8, for new employees see schedule attached

11. All stores must have a minimum of three department heads. Stores doing $325,000 per week in sales for a period of two months or more must have a minimum of 4 department heads.

12. Management has the right to reclassify an employee from FT to PT within a 12-month period subsequent to the expiration of the probationary period, for objective business or economic reasons which shall not be capricious or arbitrary. Upon reclassification employee will retain his or her wage rate and all PTO.

13. Lump Sum service buyout:
Key Food has the right to offer a buy-out to any FT employee currently employed by A&P, either prior to being hired by Key Food, or after the conclusion of the probationary period if the FT employee is hired by Key Food, buyouts will be $750 per year of service A & P with a minimum of $5,000 and maximum of $14,000. This buyout will be on a voluntary basis or in lieu of a layoff.

14. Any other terms and conditions of employment shall be negotiated on or before the new operation comments. There shall be no continuation of terms and conditions of employment from those collective bargaining agreements currently in effect with A & P or any of its banners.

15. These proposals may be modified in whole or in part, and there is no agreement until there is a complete agreement between the parties.

16. This agreement shall apply to the stores purchased by Key Food or its members from A&P.

17. If a Key Food member wishes to sell an A&P banner store within the shorter of (i) 42 months from the date of purchase and (ii) the term of the lease on the store, it will sell the store to (i) a purchaser other than the Co-op willing to recognize the unions representing the employers in that store and to proceed on the terms and conditions of employment under the collective bargaining agreements then in effect; or (ii) the Co-op. If the Co-op is the buyer, it will recognize the unions representing the employees in that the store and proceed upon the terms and conditions of employment under the collective bargaining agreements then in effect."

18. This agreement is subject to approval by all UFCW locals involved.

On September 23, 24, and 25, the Respondents and Local 342 began negotiating on their own, largely without representatives from other Locals present. Local 342 was represented by Solicito. According to union notes, Catalano began the bargaining session by stating that, "from my frame work we are essentially done," and presented the September 22 "Durso proposal" to the Union. Catalano indicated that an employee who received an involuntary buyout would retain recall rights to prevent owners of the stores from hiring relatives to replace the current employees. Solicito took the position that the Respondents should retain all employees without a probationary period that allowed for separation without cause and with buyouts that could only be implemented after six months. In this way, the Union wanted the Respondents to give employees a chance to work and see how many employees they really needed. The parties did not reach agreement or make any additional progress in negotiations on September 23, 24, and 25. [GC 49-50][R. 12][Tr. 951-955, 978-980].

On October 12, the parties spent significant time rehashing their previous positions.[9] O'Leary indicated that, regardless of any agreement the Respondents may have reached with Locals 338 and 1500, Local 342 would not accept involuntary buyouts, a probationary period for separating employees without cause, or a proposal (i.e., the September 22 proposal) with open items left to be resolved later. Union notes of the meeting indicate that O'Leary said, "we are not doing the buyout so please get that out of your head." Catalano continued to push the concept of a probationary period and buyout. He indicated that the buyout would be used as an alternative to arbitration. According to union notes, Catalano said, "I have no incentive to keep PPL that don't work out. Instead of arbitration we give them money to leave."

Catalano testified that, on October 12, O'Leary agreed to work toward a partial contract with only those major items necessary to open the stores and finish the rest later. In support of this position, Catalano referenced union notes which indicate that O'Leary said, "We need to get some agreement on how you open the stores up and we can do the rest of it later." [R. 30 p. 4 of 13.] These notes also indicate that O'Leary said, "Let's agree on the hire rates, the things that surround the members getting to work, getting jobs, hire substantially all and medical insurance and we can do a waiver for those who want to opt out [of insurance]." Further, Catalano made reference in his testimony to union notes which indicate that O'Leary said, "What I'm saying to byou [sic] is to get an agreement so you can open up and we can finish the other portions later." [GC 13 p. 12.] -- "Let's talk about hiring, staff & Medical insurance (waiver for medical)."

However, Union notes indicate O'Leary proposed that the "Key Food industry agreement" be used as a model for quickly resolving outstanding open items that were not in significant disputed (such as bereavement and jury duty) and produced such a contract.[10] [GC 80.] Union notes indicate that O'Leary said, "342 cannot do a new agreement for 42 months and not know the rest of the CBA." [R. 30 p.] Union notes also reflect the following comments by O'Leary:
[T]hat is another reason why I am saying we need to do this the right way and use the Key Food as a master. In an instance like that (closing store for a year) - those employers said when they open up they are taking whoever they take, some of those people may be working somewhere else by the time they open up, they already said they will just take the 342 contract they have now. We need to have some agreement on how you open the store up and we can do the rest of it later. Some of the stuff in your proposal will need to come out. [R. 30 p. 3.]

. . .

I have identified what we can do to have a transition agreement then we can continue to bargain a complete agreement to get to where we need to go. Let's not talk about 42 months - lets talk about no months. Let's agree on the hire rates, the things that surround the members getting to work, getting jobs, hire substantially all and medical insurance and we can do a waiver for those who want to opt out. We are talking to 338 so if we can do the same thing for a cheaper rate than we can offer we can work something out with them or the international but I cannot get that done in a week. Maybe the 338 not sure yet. [R. 13 p. 13.]

Catalano initially rejected the concept of using provisions from the Key Food industry agreement, but later indicated that certain non-economic provisions might be acceptable.[11] [GC 13] [R. 19, 20, 30] [Tr. 90-100, 211, 1786, 1800-1801, 1805-1809, 1992, 2571, 2700-2720, 2810, 2883-2884].
On October 12, the Union provided the Respondents with the following written proposal [GC 14]:

THIS AGREEMENT made between **Key Food Co-op**, hereinafter called the " "Employer", and the **United Food and Commercial Workers Union Local 342,** hereinafter called the "Union"

WHEREAS, Key Food intends to assume control of A&P stores; and

WHEREAS, Key Food intends to hire the employees currently working at those stores.

WHEREAS, Key Food has positions available necessary to employ all employees under Local 342's jurisdiction. The employees will be required to agree with the company's offer which is governed by the current Local 342 Key Food Agreement.

WHEREAS, those employees are currently represented by UFCW Local 342;

Employees eligible for any of the term and conditions of this agreement are those hired in any converted store at the time of the conversion of that store.

Upon demand by Local 342 Key Food will recognize Local 342 as the sole bargaining agent of those employees for purposes of wages, benefits, and other terms and conditions of employment. Key Food and the Unions hereby agree to the following:

1. Key Food will offer former A&P employees currently working at these stores employment. Key Food agrees to abide by the wages benefits, and terms and conditions between UFCW Local 342 and the Key Food industry agreement, and successive MOA's dated 4/15/15, and will fold A&P employees under the new Local 342 Key Food successor agreements.

2. Key Food does not assume any liability as a successor or assign or otherwise from the current "A&P" collective bargaining agreement and is not responsible for adherence to or enforcement of any other provisions of that agreement, including but not limited to grievances, arbitrations or past practice pursuant to those agreements.

3. Employees in acquired stores will complete applications, and will be hired by Key Food Employers who are specific owners of stores acquired by the Key Food Co-op.

4. All employees hired pursuant to Paragraph 3 above shall remain at their current A&P rate of pay. Key Food will consider these employees as new employees for purposes of any subsequent age or scale increases or premium pay in accordance with the Key Food/Local 342 industry agreement. In any event, notwithstanding what may be spelled out in Paragraph 1 or 4, no employee hired pursuant to this agreement shall receive a 30-day salary or hourly adjustment if they have received one already in 2015 from A&P. The 36-month waiting period for paid time off entitlement will not apply to employees hired pursuant to Paragraph 3, who instead will retain their A&P entitlements.

5. For purposes of layoff, employees subject to this agreement will keep their original A&P Company hire date within the acquired group or store. Key Food agrees that they shall not be any layoff for any employees who accept employment, Full Time or Part Time, for a period not to exceed ten (10) months. After ten (10) months, Key Food may notify the Union to sit and discuss a layoff if necessary, and the Employer must be prepared to establish a need for layoff by allowing the Union to have professionals conduct an audit pertaining to the financial condition of the store and/or company.

a. The Employers who individually own any one of the Key Food Co-op banners and who have purchased one of the banners from Key Food Co-op or A&P, shall include any other supermarket businesses that they have as part of their financing of this store when they notify the Union of their desire to have a layoff.

6. Expect where explicit in this agreement for all other purposes employees subject to this agreement assume their Key Food hire date.

7. All employees hired under this agreement will be subject to a sixty (60) day probationary period from the date of their employment with Key Food. Since Key Food has agreed to hire all employees, subject to the conditions above, the probationary period shall be subject to the grievance procedure. In addition, all employees shall remain members of the union and there shall be no interruption of union service.

8. Employees hired pursuant to this agreement shall have vacation, sick leave, holidays, and personal days calculated according to their A&P experience toward eligibility for those benefits.

A. All employees hired from A&P shall continue to work under the A&P agreement according to vacation, sick leave, holidays and personal days until December 31, 2016.

B. Effective January 1, 207, those members shall be restored all vacations, sick leave, holidays and personal days according to the Key Food Agreement.

C. All employees hired from A&P shall continue to receive their current wage rate that they are receiving now from A&P. Upon completion of the current A&P Agreement which expired December 31, 2016, the employees will then be eligible for their first wage increase in April 30, 2017. In addition, all A&P employees hired by Key Food who have had their first hour reduced to minimum wage, that hour shall be restored immediately upon being hired by the Key Food company.

D. Acquired full-time employees will maintain their full-time status; Full-time and part time Acquired Employees will maintain their current entitlements pursuant to the A&P agreement until December 31, 2016, at which time those employees will be eligible to receive their entitles pursuant to their current Collective Bargaining Agreement between Key Food industry agreement and Local 342.

9. Former employees of A&P actively employed who are hired by Key Food effective on the dates enumerated in Paragraph 5 will be granted credit for their continuous full-time service with A&P for purposes of satisfying the waiting period for eligibility for Local 342 benefit plans.

10. Key Food agrees to continue to use the vendors that are union vendors and are represented by Local 342 for a period of not less than one (1) year in an effort to avoid additional exposure of Local 342 members to layoffs.

11. The employer agrees that in the case of the wall-to-wall store that is a Food Emporium store, the Departments that are stated in the Local 338 Agreement will be mirrored for the purpose of establishing departments in all wall-to-wall stores.
a. Anywhere a department is being removed or for any reason a Department Manager is being demoted for just cause, those Department Managers who receive a premium shall lose the premium and be paid the top clerk or butcher rate in those categories.

b. The employer agrees that in wall to wall stores that it will continue to red circle rates of pay for all employees that remain employed and thereafter all new hires who are new to the industry or who have previously worked in Local 338 or Local 1500, they shall receive the rates currently under the Local 338 Agreement that is in effect in their industry contract for each classification except for those employees in the Meat, Seafood and Deli Departments. Thereafter, all employees shall receive wage increases that will be negotiated under the Key Food Industry Agreement which will cover all employees in all classifications going forward.

c. In respect to above all new hires new to the industry hired after this agreement has been signed will receive the start rates in each of their Full Time class that are established in the Local 338 agreement. Thereafter, they shall follow the wage increase that shall be negotiated in the new Key Food industry contract.

d. In the case of the wall-to-wall Food Emporium store, the Employer may after four (4) months of emplo8yment notify the Union of the need for a layoff. The employer may notify the Union of its need for a layoff in inverse order of seniority only of those employees no longer needed. The company shall not replace any Full Time employee with any part timers. The company shall pay severance to any employee that is laid off $800 per employee per each year of service. In addition, the company shall provide 6 months of medical coverage, or the money equal to 6 months of medical coverage in addition to the severance.

12. Either party desiring to modify or terminate this agreement at its expiration shall give written notice to the other party at least (60) days prior to April 30, _____.

Throughout the negotiations, in response to the proposal to buyout employees, the Union requested that the Respondents identify A&P employees they did not intend to hire. [Tr. 1796.]

On October 14, certain owners attended the bargaining session and took turns indicating the number of employees they intended to keep. Pat Conte indicated that Respondent Seven Seas would keep all employees at the Union Square store. The Abeds indicated that Respondent Greaves Lane would keep, among 12 employees, the meat manager, deli manager, deli clerk, meat wrapper, and three journeyman butchers). The Almontes indicated that Respondent HB would keep two full-time employees and two part-time employees without indicating the particular classification. The owners did not identify the names of employees they intended to keep. [R. 13] [Tr. 980-983, 1266-1268, 1809-1821, 2091, 2253-2254, 2306-2310, 2324, 2470, 2561].

On October 14, Catalano rejected the Union's October 12 proposal. Catalano said Key Food would talk about anything in it, but that the proposal was generally "off the table." The Union asked to bargain with the member-owners individually since they were going to be signing the agreements and managing the stores. Catalano rejected this request. According to union notes, Lenny Mendell said, "they can't bargain individually, they're not allowed to." [R. 13.]

On October 15, the parties exchanged emails regarding a Union request for information. O'Leary requested certain information, including each A&P store being purchased, the purchasing employer of each store, closing dates, any job advertisements for those stores, and the positions to be filled by current A&P employees. Konzelman responded and stated, in part, "I am being advised not to publish the information requested until after the hearing scheduled for tomorrow, which we expect to be formally approved as purchaser for the 24 locations." Konzelman also noted that the closing schedule was not finalized, but the Howard Beach and Horace Harding closings were preliminarily scheduled for October 21. O'Leary replied and emphasized the importance of receiving the requested information immediately. She noted, in part, that "we expect the current employees to be working on the 21st, and we need to know exactly what the employer's plan is as it affects the workers." O'Leary requested the immediate resumption of negotiations and noted that the Union would have no information to provide workers regarding their status if an agreement is not reached in advance of October 21. [GC 81] [Tr. 2730].

On October 19, the parties met and the Union continued to propose that a Key Food industry agreement be used to obtain a complete agreement, while Key Food continued to reject this idea. According to Union notes, O'Leary asked, "in terms of working off the key food contract language, how do you feel about that?" Catalano's notes indicate that he said, "the Key FD agreement doesn't fit." However, Catalano did not completely rule out using certain provisions from a Key Food industry agreement. [GC 75] [R. 20, 23][Tr. 219, 1822-1828, 2007, 2472, 2730-2740, 2559-2560, 2574-2575, 2730-2740].

Union notes of the October 19 bargaining session include the following exchange [GC 75] [Tr. 2007]:
Lo: .... In terms of working off the key food contract language, how do you feel about that?

Dc: The economic terms we aren't interested in, the union security clause, the bargaining clause. There are certain provision you need in any CBA. Not everything is accepted or rejected. Clearly there are certain things in the document that we would grasp on to.

Lo: Ok - I'm getting a picture of a boiler plate for what you are ok with. There are only certain sections

Dc: I wouldn't use the term most. I have to go through each one, the question is, is it an economic issue.

Lo: Pretty much to me it's all economic. Even though it's language.... In the same time some things are standard. A lot of language would reflect what is federal law. That kind of stuff ..... alright so let me see if can identify - do you have the key food agreement with you

Dc: I won't respond I will wright down what you say. Until I talk to my ppl

Lo: The purpose of doing this is to make it quick and so we have an idea to have a total agreement. This doesn't work for the wall to walls, the front end of course isn't listed for classification which means meat seafood and deli if we have it and the front is shared with another local. You can let me know if you have a problem with the Union recognition, classification is pretty standard. Union security is boiler plate matching up with the national labor relations act . . . .new employees, most of that is boiler plate. There is a lot of language having to do with 342 sends temp butchers off the bench to cover vacation, sick, personal comp and things like that. We have groups that are not employed that the employer use, not saying these guys to do that. I'm pointing out the language covering the temp really looks at our temp workers. Discrimination might not be a problem. Seniority is boiler plate, however I can see where you want to put something there that recognizes the employers buying more than 1 store, and having seniority amongst them for A&P seniority off layoff. The job guarantee and the replacement language that is in the standard key food agreement, doesn't really apply to these guys bec it speaks of ppl who are hired before 1995.

Catalano's October 19 bargaining notes have "Konzelman & DPC" underlined and, underneath, a list of items that appears to reflect the Respondent's position on provisions in the Key Food industry agreement. [R. 22 p. 3] [GC 80]. Thus, for example, the Key Food industry agreement contains an article (Article 2) on employee classifications and the first entry of Catalano's list states, "no job classifications." Similarly, the Key Food industry agreement contains an article (Article 4) on referrals of new hires by the Union and the second entry on Catalano's list states, "hire from any source/you can refer." The order of the list appears to track the Key Food industry agreement and not the Respondent's September 22 proposal. When asked about these notes, O'Leary confirmed that the parties were discussing proposals in the Key Food industry agreement. [Tr. 2881-2882.]

Union notes of the October 19 bargaining session also contained the following exchange [GC 75]:
Lo: Ra will speak if it is acceptable or not - our proposal was you take all the members as is. You are still working out buyout language in the front stores there aren't that many ppl in the back end. We aren't having anyone to do the butchers job. Why are you frowning?

Dc: Bc I don't think anyone ever said that.

Lo: We need to get it narrowed down. Will there be a seafood Dpt? Sharon: Not a fresh seafood dept. Break

Dc: Our counter is to hire all full timers if seafood doesn't open, and we put seafood aside. Then we higher all A&P full timer meat and deli, meat; higher them all at their rate and if they don't make probation, 750 with max of 850 but probation will be 30 days. They come to store and show what they have and we still give buyout if they don't make probation, 750, 850 max, no grievance without cause. The arbitration clause we would like to stay in this contract.

When asked about the Respondent's "counter," Konzelman testified that it was the Respondents' position until late in the bargaining session of October 21, after Catalano and Abondolo met on the side alone, to hire all non-seafood full-time employees represented by Local 342 subject to a potential buyout during the probationary period. [Tr. 2575-2577.]

On October 21, at the Union's request, the bargaining session was attended by Federal Mediator Carlos Tate. [GC 15, 76][Tr. 100-113, 141-145, 213, 226, 310-315, 1003-1007, 1028, 1057, 1115-1116, 1268-1272, 1395, 1698-1699, 1837-1852, 2046, 2051-2054, 2103-2107, 2127-2130, 2137-2139, 2144-2145, 2150, 2190, 2327, 2384-2385, 2407-2408, 2473-2478, 2575-2577,

2740-2751, 2849]. According to union notes, the October 21 bargaining session began where the October 19 ended (with Key Food restating their proposal on offering employment). The notes state [GC 15]:
Doug: Offering employment where we said we would probably not hire the Seafood Personnel, and let other FT in the store for 30 days - if they don't make probation we would give them 750/year of service that they had with A&P max of 8,000. That persons services might be terminated with or without cause. Arbitration according to the proposal - mutually select arbitrator.

The same notes later reflect a discussion regarding Respondent Key Food's proposal, as follows:
RA: You will take everybody with a 30 day probationary period Doug: And if mutually agreed upon an additional 30 days to 60.

RA: Do we have a commitment that all PT are hired, not talking about seafood in the back wall stores.

Doug: Yes.

RA: Subject to the probationary period Doug: Yes

...
Doug: During probation if they didn't get retained at the end of the period the FT will get 8,000 and 3 months medical.

...
RA: The only issue we have is whatever number we agree on on how long the person will be out, let someone go then the next day hire someone $10 cheaper, how do we protect that?

Doug: With 338, they would have recall rights for one year despite getting a buyout that is the protection.

At about 2 p.m., the parties caucused for an extended period. Thereafter, Catalano, Abondolo, and Tate met alone in a separate conference room. It is uncontested that this was a brief conversation lasting 10 to 20 minutes. [Tr. 1003-1006, 1862-1863, 2046.] However, Catalano and Abondolo provided different accounts of the meeting.

According to Abondolo, Tate approached him and said Catalano wanted to meet alone. Abondolo went with Tate to a separate room and Catalano was there. Catalano spoke first. Catalano talked about laying people off before they were hired and brought up severance for those people. Catalano allegedly referred to this as an "involuntary layoff." Abondolo rejected the concept of laying people off before they were hired, telling Catalano the Union wanted employees to be retained for a year. However, Abondolo did agree to the layoff of seafood employees by a store that did not intend to maintain a live seafood department. Abondolo proposed that employees receive $800 per year of service with no cap on the number of years. Of this $800 per year, the Respondent would pay $400 per year if the other $400 per year was paid by A&P pursuant to the severance provision in a collective-bargaining agreement (as modified by the 2011 bankruptcy order). Abondolo denied that he or Catalano discussed the payment of severance in four installments. Abondolo also adamantly denied he ever told Catalano they had an agreement on the contract as a whole or that the Union was accepting the Respondents' contract proposal in its entirety. [Tr. 1003-1006, 1045-1047.]

According to Catalano, Abondolo approached him and asked him to come into a conference room with an oval or octagon table and comfortable chairs with big backs. Catalano testified that Abondolo spoke first, describing the conversation as follows [Tr. 1841-1842]:

And he said, “we have an agreement. We'll agree to what you want,” in so many words. Do I remember the exact sentence? No, but we were talking about our proposal and he said, “we have an agreement. We're good to go. I want to raise one thing with you, though.”

“What is that?”

It's .... the buyout numbers. I said, “You don't want,” exact words, I don't know, but “you won't want the 750 model that's in our contracts per year of service with A&P and the minimum of 5,000 and the maximum of 14,000?”

He said, “No, what I want to do is I want 800 without a cap,” because the 338 and 1500 and 464 had a cap, a minimum and a maximum. So he says, “I don't want that. I have the ability to get my Members a severance payment from A&P under those provisions that we talked about yesterday, testified to yesterday, where you get if you close down $800 for each year of service if you've been employed by A&P since 1995; 1981 with Pathmark; 2004 I remember in another agreement. I can get them a severance payment there. And what I'd like you to do is if they don't get a severance payment give them $800 for each year of service without a cap or $400 in the event that they're getting severance from A&P.”

I said, “Now I understand where you” - because I didn't understand that came up on occasion, even though on the 19th he said, “I agree to the $750,” and now he's - I'm not saying that he's changing it, but here's what he's suggesting. “Okay, we have an agreement pursuant to what you're proposing, but I want that changed.” I said, “Fine, let me talk to my people. Sounds good to me. I'm okay with that. I'm glad.”

Neither Catalano nor Abondolo took notes in the meeting and they did not have or make reference to the Respondents' September 22 proposal with them in this side-discussion. [Tr. 1862-1863, 2057.]

When Catalano was asked at trial whether he recalled the exact words Abondolo used during the side-discussion on October 22 to indicate the parties had reached an agreement, he responded, “Exact words, of course not. . . . [Abondolo] said in so many words, whether the exact phrasing is as follows: Doug, we're done. We have a deal. We agree, but I want to talk to you about the $800 and the $400.” When Catalano was asked whether he had a specific recollection of Abondolo referring to the Respondent's September 22 proposal in the side-discussion, Catalano responded, “no, in advance of the sidebar. . . . Early on. They showed up late. We met for half-an-hour. We're saying in so many words consistently this is it. This is our model. This is what we want. This is what we're insisting upon.” [Tr. 2056-2057.]

According to union notes, when Catalano and Abondolo returned from meeting separately, the bargaining session continued as follows [GC 15]:
Doug: you suggested off the record a different model - if you've been with A&P under 342 contract $800 for each year of service, A&P will pay 50% so we will pay $400 for each year of service without a maximum. There are some people who have 40 year people and if you agree it will be paid out in 4 monthly payments. This is for the Full Timers if we don't hire them. If we do hire them and they don't pass probation - 338 model is a little different. What we talked about if they don't make the probation will get $750 with a max of $8,500.

RA: I was concerned about getting into an understanding about part-timers.

Doug: If we don't hire the FT you asked whos going to do the work. I will be candid and either FT will be reduced to PT or a PT cutter or reduce the full time to PT on day one. I will prepare something. Tomorrow rather than meet I will prepare something send it to you with these kinds of concepts. Last night we did not do a PT severance. We got calls from 338 that we misunderstood. We agree this afternoon -

Sharon: Because we said we are hiring all FT. we would offer 1-7 years 1 week at current rate of pay avg hours, 8-11 gets 2 weeks, 12-15 3 weeks, 16 or more get 4 weeks.

Doug: That's what they asked for and we said fine. We said we will hire all the PTers and we are with 338 and 1500 as well.

RA: Only if they don't make probation.

Doug: People might be used to the Walbaums way which might not be the same way they are used to.

RA: Do you know how much that costs?

Doug: $350-$400 per week by 1 week, or 4 weeks. That's what they asked for. We weren't going to do anything but they asked for it and we said fine.

RA: We will work through the language.

Doug: I will put an MOA together and send it to you guys. We will send you something in the afternoon by this afternoon.

RA: Okay. By that point we can put it to bed. When are the transitions taking place.

Abondolo testified that in referring to "it" in "put it to bed," he was referring to contract negotiations. However, Abondolo testified that Catalano misspoke in his comments to the larger group about what they had discussed separately in the side-discussion. According to Abondolo, he told Catalano so and was not particularly hopeful that Catalano was going to prepare an MOA that was acceptable to the parties.

Witnesses for the Respondents and Union also provided conflicting testimony as to how the meeting ended. Catalano, Konzelman, Conte, Mandell, and Diaz testified that Abondolo walked over to where they were and shook their hands. Catalano testified that he had a particularly strong recollection of Abondolo shaking hands with nonunion owners whom he talked badly about during negotiations. The Respondents' witnesses also testified that they went out for a congratulatory drink after the October 21 bargaining session.

Abondolo, O'Leary, and Booras testified that there was no ceremonial or congratulatory handshaking at the end of the October 21 meeting. O'Leary noted that it is common for parties to shake hands at the end of bargaining when they reach an agreement, but it is not a practice she enjoys and this did not occur on October 21. She testified, "I'm not a big handshaker type, you know, ceremonial person. But I realize, you know, especially men, . . . they like to do it. . . . there was no ceremonial shaking of hands, in that room, with all the parties there" and "I don't recall anybody looking to shake hands with me that day either." [Tr. 143.] Booras and O'Leary both noted that the Union made no arrangements for a ratification vote of the alleged deal because there was no agreement. [Tr. 141-145, 1005, 1379-1380.]

On October 22, Catalano sent the Union an email that stated, "Attached is a draft that is consistent with the 338 agreement but has not yet been reviewed by our client." [GC 16][R. 1, 15]. The attachment was a Memorandum of Agreement (MOA). Catalano testified that this MOA reflected an agreement the parties reached on October 21. The MOA includes, in part, the following provisions [GC 16]:

2. OFFER OF EMPLOYMENT

a. Upon the opening of its store, or stores, the Employer shall offer employment to current A&P employees before hiring anyone else subject to the terms of this agreement. A minimum of 50% plus 1 employees will be hired by the Employer from A&P employees.

b. The offer shall be made unconditionally without any review or interview.

c. Notwithstanding the above, the Employer may offer a buyout to any full-time employee currently employed by A&P, before the opening of its store, or stores, or after the probationary period. In such instance, the Employer shall pay to the employee $400 per each year of service with A&P. Payment shall be made of the aggregate amount in four (4) monthly installments. This buy-out may be voluntary, if offered by the Employer, or in lieu of a layoff. (no payment of entitlements). Buyout in lieu of layoff for one year from date of hire.

d. Future layoffs of employees not subject to the buy-out in 2(c) shall be by seniority (the last employee hired shall be the first employee laid off) within a classification. In case a buyout results from a layoff or pursuant to 2(c) above, the affected employee shall have the right of recall based on seniority (the employee with the most seniority shall have the first right of recall) for a period of one year, and shall be entitled to receive the highest rate of pay he or she received prior to the layoff regardless of any payments received from a buy-out.[12]

3. PROBATIONARY PERIOD

a. All full-time and part-time employees shall be on probation for the first thirty (30) days of his or her employment. This probationary period may be extended for an additional thirty (30) day period, but only upon mutual agreement.

b. During the probationary period, the Employer may terminate a full-time or part-time employee with or without cause. However, a full-time employee formerly employed by A&P who is terminated without cause shall be paid $8,000.00 in severance pay, and the Employer shall make sufficient contributions in order to provide the employee with three (3) months of continued medical coverage after the termination. (no payment of entitlements) A part-time employee formerly employed by A&P who is terminated without cause shall be paid in accordance with the following schedule:

Employment with A&P	**Weeks of Buy-out (based on avg. Hours of work in prior year)**
1-7 years	1 weeks
8-11 years	2 weeks
12-15 years	3 weeks
16 years	4 weeks

c. No person who passes probation shall be disciplined or discharged except for just cause.

5. WAGES

a. All employees hired directly after being employed at A&P shall be hired at the same rate of pay as he or she received at A&P.

...

f. The Employer may reclassify a full-time employee to part-time status within a twelve (12) month period following the expiration of the probationary period but only for objective business or economic reasons, and not for any other reason including discipline, retaliation, or reasons deemed capricious or arbitrary. Upon reclassification, the employee shall retain his or her wage rate and all previously-allowed paid time off.

...

9. GRIEVANCE AND ARBITRATION PROCEDURE

a. Any complaint, dispute, or grievance arising between the parties concerning the interpretation or application of this Agreement shall be adjusted in the following manner:

b. A representative of the Union shall meet with the Employer or its designee to discuss the grievance. If after such discussion the grievance is not settled, either party may submit the grievance to a mutually agreed upon arbitrator or if no agreement, the parties utilize the American Arbitration Association. The decision of the arbitrator shall be final and binding upon the parties and the employees and shall conclusively determine the matter submitted to the arbitrator. The cost of arbitration shall be borne equally by the parties. The grievance and arbitration procedure specified in this Agreement is the sole and exclusive remedy of the parties, and such procedure shall be in lieu of any and all other remedies at law, in equity or otherwise. No individual employee may initiate any arbitration proceeding.

10. DEPARTMENT HEADS

a. All back wall Key Food stores shall have a minimum of one (1) full-time department head, unless it is a wall-to-wall store, wherein it must have three (3) department heads.

b. All Key Food stores which are wall-to-wall stores with over $325,000.00 in sales per week during a two month period shall have a minimum of four (4) full-time department heads.

11. ADDITIONAL TERMS

a. The parties may negotiate other terms and conditions of employment on or before Key Food begins its business at the former A&P locations. Other than the terms herein, the terms and conditions of employment between the Union and A&P shall not be applied to the Employer unless and until they are negotiated by the parties.

12. FINALITY OF AGREEMENT

a. The parties understand that the Employer is currently negotiating similar agreements with other UFCW locals, and agree that the successful negotiation of such agreements is essential before the agreements herein take effect.

14. Additional Terms

The parties agree that there will be a union security clause, recognition clause, no lie detector clause, management rights clause, no discrimination clause, bulletin board clause, and no employment of minors clause.

During the term of this Agreement, there shall be no lockout by Employer, and no-strike, picking or hand billing by the Union. Employees shall not be required to cross a picket line in the event of safety issues, and a clause will be agreed upon that permits the waiver of the no-strike clause in the event of a failure by the Employer to make contributions. with all language in a these clauses to be agreed upon.

Minimum of four (4) hours if called into work.

Breaks - For FT - 2 15 minute breaks, 1 hour unpaid lunch. PT - 1 15 minute break for each 4 hours worked. 1 hour unpaid lunch (for 8 hours), ½ hour unpaid lunch (for at least 5 ½ up less than 8 hours).

Overtime - overtime over 8 hours in a day (OT over 10 hours for an employee working a 10 hour/day, 4 day per week schedule).

Union Visitation - the union representative will advise the employer of his presence upon arriving at the workplace.

Funds - Employer will continue payment to funds for 13 weeks for illness or disability. The Union and Funds have the right to review the Employer's records.

Funeral Leave - FT - 3 working days. PT - same as FT (prorated) Immediate Family.

Jury Duty - Involuntary Jury duty will be two weeks/year (Grand Jury 30 working days over the term of the agreement).

Uniforms - the employer will furnish/launder uniforms if required to be worn. Transfers - ok for employers w/ multiple stores covered by this Agreement. Subject to reasonable radius of home or last store location, reimbursement for additional fairs/ tolls/gas.

Shop Stewards - the Union may have one shop steward per store. 1 day off /w pay per year for training.

Thus, the MOA contains certain "additional terms" that were not previously included in its September 22 proposal, including clauses regarding no-strikes/lockout, breaks, overtime, union visitation, funeral leave, jury duty, uniforms, funeral leave, and transfers. While similar provisions are contained in the Key Food industry agreement, the MOA provisions were not identical or cut-and-pasted from the industry agreement. [GC 80.] For example, contrary to the Key Food industry agreement, the MOA adds a requirement that a union representative advise the employer of his presence upon arriving at the workplace, commits only to "payments to funds for 13 weeks for illness or disability," limits jury duty to 2 weeks per year (verse 30 days), adds restrictions on transfers, and eliminates 2 days leave for stewards to attend training/meetings. [GC 80] [R. 20]. The MOA also provides that certain additional clauses on union security, recognition, no lie detector, management rights, no discrimination, bulletin board, and no employment of minors clauses would be included in the final collective-bargaining agreement (presumably, after additional negotiations regarding those subjects).

On October 26, Respondent HB assumed ownership of the store in Howard Beach and Respondent Paramount took ownership of the store in Flushing, New York. These were the first two A&P stores to transition to Key Food. [Jt. 6].

On November 2, Abondolo's clerical assistant, Janel D'Ammassa, sent Catalano a revised MOA that was prepared by O'Leary. D'Ammassa's email indicated that it was "sent on behalf of President Richard Abondolo" and included the following comments [GC 17]:[13]

The attached document represents the reflection of my notes during our discussions. I don't believe that we are at all at a difference. I am willing to sit with you any time to discuss the terms and conditions for the rest of the agreement. Until then, it is my position that we are covered by the Key Food Industry Agreement for the following reasons. As you know, your employer is doing what they want and not following the rules. I expected this from the beginning, but I'm not very excited about it. I have complete faith in you that you will get it rectified so that we can move on. But not to have temporary provisions in place would be insane. I hope you could sign off on that and understand.

....

**Note: Doug, leave the grievance and arb language alone. I left Kennedy out in good faith. I'm not agreeing to AAA at all. I put 2 in, you can put 2. But with these guys you'll probably lose anyways, they'll follow no rules.

Contrary to Catalano's October 22 MOA, the Union's proposal provided for all former A&P employees to be hired except seafood department employees (if the store was closing the seafood department), all employees who were laid off without cause (including those severed during probation) would have recall rights for one year, the reclassification of newly hired full-time employees to part-time status would only be allowed in lieu of a layoff, a panel of arbitrators instead of arbitration through AAA, additional minimum department heads, and additional provisions from the Key Food industry agreement wherever the MOA did not specifically address the subject. [GC 17.]

On November 13, the Respondents provided the Union with a redlined MOA reflecting language the Union struck from and added to the October 22 MOA [GC 19]:

2. OFFER OF EMPLOYMENT

a. Upon the opening of its store, or stores, the Employer shall offer employment to current A&P employees before hiring anyone else subject to the terms of this agreement. <u>All employees in UFCW Local 342 shall be offered work, except in the case where the employer is closing down Seafood Departments in which no cutting, wrapping or processing of fish is involved. The employer shall pay the Seafood employees a severance as stated below. In addition, if the employer decides to open a Seafood Department any time during one (1) year from the date of purchasing the store, the employer shall call back the Seafood employees to be reinstated in their former job at their former rate of pay that they received from A&P.</u>

...
i. the Employer shall pay to the employee $400 per each year of service with A&P. <u>This shall be paid to those employees who are entitled to severance under the A&P Agreement.</u>

ii. <u>In addition, the employer shall pay $800 per year for each year of service with A&P for employees who are not entitled severance under the A&P Agreement.</u>

iii. d. <u>The employer agrees that all layoffs after thirty (30) day probationary period</u> shall be by seniority <u>the classification. All employees who have been laid off and paid severance shall also be entitled to three (3) months of medical coverage, which shall be provided by the employer bb either continuation of current medical coverage, or providing adequate moneys to cover the COBRA</u> payments

5. WAGES

...

g. The Employer may reclassify newly hired full-time employee to part-time status only in lieu of a layoff within a twelve (12) month period following the expiration of the probationary period but only for objective business or economic reasons, and not for any other reason including discipline, retaliation, or reasons deemed capricious or arbitrary. Upon reclassification, the employee shall retain his or her wage rate and all previously-allowed paid time off.

. . .

9. GRIEVANCE AND ARBITRATION PROCEDURE

. . .
b. A representative of the Union shall meet with the Employer or its designee to discuss the grievance. If after such discussion the grievance is not settled, either party may submit the grievance to a mutually agreed upon arbitrator panel of arbitrators. Each party shall pick two (2) arbitrators. The Union's picks are as follows: Elliot Shriftman and Ron Betso. The decision of the arbitrator shall be final and binding upon the parties and the employees and shall conclusively determine the matter submitted to the arbitrator. The cost of arbitration shall be borne equally by the parties. The grievance and arbitration procedure specified in this Agreement is the sole and exclusive remedy of the parties, and such procedure shall be in lieu of any and all other remedies at law, in equity or otherwise. No individual employee may initiate any arbitration proceeding.

10. DEPARTMENT HEADS

a. All back wall Key Food stores shall have a minimum of two (2) full-time department head, and a minimum of three (3) department heads where a Seafood Department is present, unless it is a wall-to-wall store, wherein it must have four (4) department heads.

11. ADDITIONAL TERMS

a. Employer agrees to follow the terms and conditions of the Key Food Industry Agreement unless otherwise spelled out in this agreement, or unless negotiated otherwise.

13. FINALITY OF AGREEMENT

b. The parties understand that the Employer is currently negotiating similar agreements with other UFCW locals, and agree that the successful negotiation of such agreements is essential before the agreements herein take effect.

15. Additional Terms

All of the following articles will be covered by the Key Food industry Agreement, in addition to any others not stated here. Only those that have been signed off on in this agreement will change from what is stated in the Key Food Industry Agreement. Strike Language - Strike Language in the Key Food Industry Agreement.

....

The Union is willing to sit and discuss any terms and conditions other than those signed off on in this agreement where both parties have agreed. In addition, it will remain the Union's position that until then, the Employer shall be covered by the Key Food Industry Agreement and this document.

On November 13, the Respondents did not offer any counter proposal to the Union's proposal of November 2. Union notes of the November 13 bargaining session include the following [GC 18]:
DC: How would you like to precede Lisa, the proposal you sent is not acceptable. What we had sent to you, I thought we had a done deal. These proposals are substantially different from the 3 contracts. We already have. Therefore, we are not inclined and won't do something different, so it wasn't reduced to writing and it wasn't ratified. I had heard something that we said was inaccurate which was we would take everyone from day 1 until 30 days, which I never said and would not have said. Doesn't mean I won't hire part timers or full timers, and they will or will not pass probation. Things like hiring two meat managers we never agreed to that, I don't see how it made its way into this agreement and I don't see how we can do anything differently and won't. There are things you put in here that 1st hour is not minimum wage 1 or 2 little things in here that are helpful however the substance of change and including that this is going to be the Key Food, Pick Quick, Mandell, and Dan's Supreme contract is not acceptable and I said it to RA over the phone. We think we came up with a fair proposal that worked for everyone. The staffing in those stores was extraordinarily high and I think in fact Local 342 concedes it, 338 concedes it, 1500 concedes it. Therefore, we had to come up with a fair way of making sure these stores would work going forward. The A&P way for sure didn't work.

Throughout negotiations, the Respondents asserted that the A&P stores they were attempting to purchase had excess payroll and, in particular, too many full-time employees. [Tr. 1033-1034.] In response, Abondolo conceded that the Union Square store being purchased by Respondent Seven Seas was "heavy" in that it had a lot of full-time employees. [Tr. 232, 1084-1086, 1744-1749.]

Adverse Employment Actions Taken Against Individual Employees, Respondent Albany Avenue's Rules, and the Alleged Interrogation by Frank Almonte

As discussed in greater detail below, the Respondents allegedly took the following unlawful adverse employment actions 5 against the listed employees:

Respondent	Adverse Action	Employee	Date of Action
HB	Caused Layoff by A&P	Nelson Quiles	October 23
HB	Refused to Hire	Nelson Quiles	October 26
Seven Seas	Refusal-to-hire	Natalie Tirado	November 9
Seven Seas	Refusal-to-hire	Madeline Gomez	November 9
Seven Seas	Refusal-to-hire	Rosa Silverio	November 9
Seven Seas	Refusal-to-hire	Elena Pagan	November 9
Seven Seas	Refusal-to-hire	Tamika Jones	November 9

Seven Seas	Refusal-to-hire	Keesha Fields	November 9
Seven Seas	Refusal-to-hire	Juana Diaz	November 9
Seven Seas	Refusal-to-hire	Jose Carlos Colon	November 9
Seven Seas	Refusal-to-hire	Jerry Simpson	November 9
Seven Seas	Refusal-to-hire	Ricardo Nunez	November 9
Seven Seas	Refusal-to-hire	Dena Iturralde	November 10
Seven Seas	Refusal-to-hire	Maria Ortega	November 10
Seven Seas	Refusal-to-hire	Lucy Maldonado	November 10
HB	Layoff	Venus Nepay	November 10
HB	Layoff	Richard Maffia	November 11
HB	Layoff	Khadisha Diaz	November 12
Greaves Lane	Reduced work days	All unit employees	November 25
Greaves Lane	Layoff	Gina Cammarano	November 28
Greaves Lane	Layoff	Debra Abruzzese	November 28
Albany Avenue	Layoff	Joseph Batiste	November 28
Albany Avenue	Layoff	Kalvin Harris	November 28
Greaves Lane	Layoff	Michael Fischetti	November 30
Greaves Lane	Layoff	Anthony Venditti	November 30
Seven Seas	Layoff	Ayanna Jordan	December 26

Albany Avenue	Reduced work days	Robert Jenzen	Late-December
CS2	Layoff	Mariano Rosado	January 4, 2016
Albany Avenue	Reduced work hours	Robert Jenzen	Mid-January, 2016
Albany Avenue	Demoted	Stephen Fiore	January 16, 2016
Albany Avenue	Reduced wage rate	Stephen Fiore	January 16, 2016
Albany Avenue	Reduced work days/ hours	Stephen Fiore	January 16, 2016
Albany Avenue	Layoff	Robert Jenzen	January 30, 2016
Albany Avenue	Layoff	Stephen Fiore	January 30, 2016

This section of the decision also describes the alleged unlawful interrogation of Quiles by Frank Almonte on September 6 and the promulgation of alleged unlawful rules by Respondent Albany Avenue in January 2016.

Respondent HB

Respondent HB purchased the Wauldbaums in Howard Beach on October 26.[14] Prior to the sale, the meat department consisted of meat manager Nelson Quiles, "first man" butcher Robert Haenlein, full-time meat wrapper Venus Nepay, and part-time meat wrapper Khadisha Diaz. Richard Maffia worked in the Howard Beach meat department as first man from 1996 to 2014. However, Maffia left Howard Beach in 2014 and transferred to a Waldbaums in New Utrecht Avenue in Brooklyn to become the meat manager. The New Utrecht store closed as a result of the 2015 A&P Bankruptcy. [Jt. 6] [Tr. 116, 1405-1409, 1424-1426, 1856-1857, 2162].

On about September 5, apparently unrelated to negotiations that were taking place with the Respondents, a job action was undertaken by Locals 338, 342, and 1500 at a Key Food supermarket on Cross Bay Boulevard, Queens, New York. Frank Almonte is an owner of the Cross Bay store and the employees of Cross Bay are not unionized. The store held a block party to celebrate the anniversary of its first year in business. UFCW Locals engaged in a demonstration during the block party in order to protest the store's failure to maintain compensation at area standards. Local representatives erected an inflatable rat, handbilled, and talked to people both individually and with a microphone. The Locals also had a videographer record the job action. [GC 61] [Tr. 106, 1340-1344, 1347, 1431-1432, 1440, 1506, 1596-1600].

The Cross Bay job action was attended by Quiles. The Union's video of the Cross Bay job action shows that Frank Almonte was in a position to see Quiles while he was being interviewed by a union representative. [GC 60, 61, 68] [Tr. 1432].

Quiles passed away on September 27, 2016 (prior to the trial in this case). [GC 59.] The General Counsel sought to enter into evidence an affidavit that was provided by Quiles during the Regional investigation. In his affidavit, Quiles described what allegedly happened on September 6, the day after the Cross Bay job action [GC 60]:
The following morning, the owner of the Cross Bay Key Foods, Frank Almonte, and his cousin, (whose name I don't recall, but it may have been Armando). They came at around 7:50 am to Waldbaums. I got a call from the girl in the deli saying that someone was here to see me. I said "for me?" She said, "yeah, they are asking for Nelson." I came out from the meat department

to see who it was. Frank and his cousin came to the back and we were talking in the back part of the store, right between the deli and the meat department. (There is a double swinging door leading to the processing room which is visible through some glass windows between the deli and the showcase area).

When I came out, I asked, "who are you." He said, "I am Frank Almonte, the owner of Key Foods." I replied, "I am Nelson." And we shook hands. Frank Almonte asked me, "do you think that was a nice thing that you did?" I assumed he was talking about the leafleting the day before. I said to him, " "business is business." He repeated three or four times, loudly and boisterously, "do you think that was a nice thing to do." I felt slightly threatened. I didn't know if they were going to come at me front ways or sideways. I just repeated "business is business." He said who sent you. I said, "the Union." I said "Local 342. "He and his cousin kept saying, "who in the Union?" I said, 'the Union, Local 342" Finally I said, "I have meat to cut, have a nice day." And I walked away from him, politely, and went back to the meat department. I don't know how long they stayed there after.

HB Deli employee Angela Querrard testified that, the day after the Cross Bay block party, Frank Almonte and his cousin Anthony Almonte came to the Howard Beach store.[15] Querrard saw Frank and Anthony Almonte approach Quiles and talk to him. The record contains an email dated September 6, 2015, 9:06 am, from Union Representative Liz Fontanez to Stephen Booras and Margaret Monier, which states as follows [GC 62]:
Nelson Quiles from Walbaums Howard beach called me that the store got a visit from the owner of Keyfood on Crossbay. He told him that it wasn't right what was done yesterday Nelson told well business is business and you need to do the right thing. He walked away and started talking to the other departments.

On October 23, Quiles was laid off. In his affidavit, Quiles described the events of that day as follows [GC 60]:
On about Friday, October 24, 2015,[16] Gilberto Almonte, Franky Almonte, and another person who I didn't know went downstairs with the store manager Davis Britt. They were there for several hours and everyone was told to stay out. Around 2:30pm or 2:45pm that day, I saw Britt mulling around in the back of the store, near the entrance of the meat department. I asked him if everything was ok, because he had a long face. He said everything was fine.

After about 10-15 minutes, while I was talking to my fellow coworker, Robert Haegland, a temporary butcher working in the meat department, Davis Britt came up to us and told Haegland that he needed to speak to me privately. Britt says to me, "your position with the company is no longer available' I said, "meat manager?" He said, yeah. I said, "what about meat cutter?" He said, "no, you are done." I shook hands with him and said ok. As he was walking away, said, "can I empty my locker out. He said, do as you have to. On my way out Ishowed him what I had taken of my personal belongings in a small box.

The Respondents called Gilbert Almonte to testify regarding Quiles but did not call Frank Almonte or Britt.

Gilbert Almonte testified that he, Frank Almonte, and Key Food Retail Operations Manager Kathryn Berliner did meet with Britt in the basement of the Howard Beach store after having received a list of the employees who were employed by A&P at Howard Beach. At this meeting, the Almontes asked Britt about the work habits of employees and, based on information they received from Britt, determined which employees to keep.[17] According to Gilbert, Maffia and Quiles were both on this list of Howard Beach meat managers. Britt told them Maffia had been transferred and no longer worked there. Britt also allegedly said that Maffia's cuts of meat were better than those of Quiles and the meat department did more sales when Maffia was at the Howard Beach store. According to Gilbert, based on this representation, the Almontes decided they wanted Maffia to be the meat manager instead of Quiles. A couple of days before they took over the store, Gilbert asked the Union to make Maffia available in place of Quiles. However, Local 342 said they could not do that because Maffia was working somewhere else. Gilbert denied that the Almontes ever told Britt to lay off or fire Quiles.[18] [Tr. 2173-2174, 2177, 2226.]

After Quiles was laid off, first man butcher Robert Haenlein began performing the meat manager work that Quiles previously performed. Haenlein testified that nobody asked him to assume those responsibilities, but he did so because the work had to get done. Haenlein was never formally promoted to meat manager and never received an increase in pay. [Tr. 1330-1331, 1338-1339.] The record does not demonstrate that the Almontes were aware that Haenlein assumed the responsibilities of meat manager after Quiles was laid off.

On October 26, Respondent HB purchased and assumed the operation of the Howard Beach store. Respondent HB hired all the employees previously employed at the store by A&P but did not hire Quiles. Gilbert testified that Quiles was not hired because he was laid off before Respondent HB purchased the store. [Jt. 6] [Tr. 832].

Haenlein testified that Respondent HB hired two Spanish speaking butchers when the store transitioned to Key Food and within a week of Quiles' layoff. [Tr. 1434.] Union Representative Liz Fontanez identified them as Elias and Daniel (previously represented by the Union at a C-Town supermarket). Fontanez was aware that Daniel and Elias went to work for Respondent HB because Daniel called and told her. Daniel also told Fontanez he was being paid in cash. Payroll records indicate that Elias Castillo and Daniel Monegro began receiving paychecks from Respondent HB on March 11, 2016. [Jt. 14] [Tr. 1529-1530]. However, Gilbert Almont and HB bookkeeper Marilyn Diaz testified that Castillo and Monegro were hired in about November.[19] [Tr. 1660, 1664, 2215.]

In late-October, O'Leary called Catalano and told him the Almontes committed an unfair labor practice by laying off Quiles after they saw him at the job action at Cross Bay. Catalano asked O'Leary not to file an unfair labor practice charge until he had an opportunity to speak with his clients.

Catalano subsequently advised O'Leary that the Almontes had requested Maffia by name to be the meat manager and did not want Quiles back. However, Catalano said Quiles could work at the Diaz store in Glen Oaks. The Union and employees ultimately agreed to this arrangement. [Tr. 154-156, 2175, 2696-2699.]

On Monday, November 9, at the Union's direction, Maffia reported to work at the Howard Beach store. Maffia testified that he worked the whole day and a time card confirmed he worked one day for 8.03 hours. Payroll records also indicate that a check in the amount of 237.48 ($29.50 per hour) dated November 20 for 8.05 hours of work was issued to “Richard Massia.” Gilbert Almonte did not recall a Richard other than Richard Maffia having worked in the meat department and he confirmed that $29.50 would be a meat department wage.[20] Maffia further testified that Britt and Gilbert told him he would be off on Tuesdays, so he did not report for work on Tuesday, November 10. [GC 43] [Tr. 1407-1408, 2217].

Gilbert Almonte testified that Maffia arrived for his first day (November 9) dressed for work as a butcher, but left before starting and never came back. Gilbert recalled that someone (perhaps one of the meat department employees) told him Local 342 was pulling meat department employees out of work. Gilbert described that day as hectic and having some calls with his lawyer. Gilbert did not explain why Maffia's time card indicated that he worked eight hours his first day. Further, a position statement submitted by Catalano to the Region during the investigation of this matter stated, “Richard Maffia was hired by HB Food Corp. for one day” and “was thereafter terminated by HB Food Corp. . . . .” [GC 78] I find that Maffia did work his first day, Monday, November 9, and did not work on Tuesday.[21] [Tr. 2207, 2175-2177, 2217, 2227.]

On November 10, Respondent HB laid off part-time meat wrapper Venus Nepay. Gilbert Almonte told Nepay she was being laid off because she was “having a lot of problems.” Nepay testified that she had no history of discipline, but Gilbert told her about a week before her layoff that she was not wrapping the meat packages tight enough. Gilbert testified that one of the reasons he laid off Nepay was because she was not wrapping the packages of meat in a manner that was taught and clear. Gilbert further testified that other reasons for the layoff of Nepay was her high wage rate and her failure to follow through on things she was asked to do. [Tr. 93-96, 2178-2179, 2183.]

On November 11, according to Maffia, he reported to work. Assistant Manager Danny Ryan asked him what he was doing there, and Maffia said he was off yesterday and back to work today. Ryan made a call and then told Maffia, "we don't need you anymore." Maffia told Ryan he thought it was odd to be requested by name and then laid off 2 days later. On his way out of the store, Maffia saw Gilbert Almonte. Gilbert said to Maffia, "sorry we just don't need you anymore."[22] [Tr. 1409-1410.]

On November 12, Respondent HB laid off part-time meat wrapper Khadisha Diaz. Gilbert Almonte told Diaz they were making some changes in the store and were not going to need her any more. Diaz testified that her mother worked for Local 342 and that Britt knew she was her mother. According to Diaz, her mother came to the store before it was purchased by Respondent HB and had a working relationship with Britt (who remained employed after the sale). [Tr. 1579-1583.]

Quiles worked one day in Glen Oaks, but was told not to come back thereafter because it was a temporary 1-day assignment. [Tr. 2394, 2695-2700, 2830, 2835.]

At the bargaining session held on November 13, O'Leary objected to Maffia and Quiles being laid off after one day of work. O'Leary reminded Catalano he promised to resolve their terminations by placing Maffia and Quiles at Howard Beach and Glen Oaks, respectively. Catalano first said he did not remember, but then admitted he did make such a promise. According to O'Leary, Catalano also said, "you had a demonstration in front of the Almontes' other store, and--and put a rat up there; and do you think that's right?" Catalano claimed that Quiles and Maffia did not show up for the positions, and O'Leary told him "that's ridiculous; that's not what happened." Catalano did not offer to find the employees other employment and, therefore, O'Leary said the Union would file an unfair labor practice charge. [GC 18] [Tr. 150-157]

Union notes of the November 13 bargaining session include the following [GC 18]:
LO: So this just one example of what happens after you guys do what you did, there is a long list and we will deal with it. We sent him because that's would you told us would take care of that part of the problem and we said good then we won't file any charges the other guy will be placed in another store, you said that is a good resolution. We sent Richard Mafia and they told him to you out they don't know why, the other guy we got which was resolve the other problem, that guy has also been let go. So no one kept their word about anything. I'm just going to put that on the table and you can discuss it when we have a break but that is where we are with that. In addition to that, the agreement was ppl were going to work for a period of time and have the opportunity and be able to work, that is not what happened; listen to what I am saying. No matter what anyone thinks they can do or has the right to do or has alleged reasons why they are doing those things, absolutely no one from either A&P or Key Food called the Union first and said went ahead and did things that they weren't supposed to do. I don't need to discuss that right now, it will go to litigation. You can try to fix it, we can try to get an agreement or we can send ppl to litigate. As ppl are getting laid off we have nothing to tell them. I have nothing

DC: Do you give anyone advance notice when you put a rat out in front of a store??

LO: That has nothing to do with what we are here to discuss....

At a bargaining session on November 19, according to Solicitor, the Union again objected to meat cutters being let go at the Glen Oaks and Howard Beach stores without any notice or discussion with the Union. Solicito testified that Catalano said the owners did not want to take the employees back because the Union put up picket lines. [Tr. 957-958.] Union notes of this bargaining session include the following [GC 51]:
DC: The proposal had been for anyone you don't want gets $400 that was RA's proposal. The contract with A&P is 50+1 ($800.) - 50% from A&P and 50 from you. It will be difficult to get Almonte and Diaz into the barn after what happened this week although we have every interest to get Almonte into the tent_

LM: I don't want it, I am handling these guys and they will hop on the table. It's been a big problem for us.

DC: To control them has been difficult; I don't think he will pay severance. I didn't know about Maffia, does he have a job somewhere else?

LM: The co-op will pay severance.

DC: How many were let go?

LS: about 10 ppl

DC: From which stores?

LS: Almonte and Diaz's store--almost 10 ppl some part timers mixed in with 22 meat cutters, 613 Glen Oaks, and meat manager.

DC: But he was let go from Lindenwood first

LS: Yes but then he was let go from Glen Oaks, 3 full timers. Meat managers reduce to 30 hours and the wrapper

DC: I don't know about that I can't tell Alvin ..... We can have a new hire rate

LM: They can't go in and find a friend for $19 an hour. We are looking to save money

LS: Let's say in store 613 where they got rid of Nelson, if Jack gets let go, why doesn't Nelson come back?

DC: They can't have those guys come back to the store

DA: Why not

DC: Bc with what Almonte and Diaz went through they won't take them back. They don't have to take them back either. They can walk in and say this is how it was constructed...

Catalano testified that, on November 19, a discussion of severance led to a discussion of Maffia and Quiles. According to Catalano, Abondolo asked, "Will you bring them back?" Catalano claims he responded, "Based on what they did? But you know what, I'll ask." Catalano testified in talking about "what they did," he was referring to "illegal acts" engaged in by individuals involved in the union handbilling. [Tr. 1886-1889.]

Catalano further testified that he spoke to Abondolo by phone in late-November or early-December and offered to "take back" Maffia and Quiles, but Abondolo said to "forget it" because he (Abondolo) would get them jobs somewhere else. [Tr. 1887, 2020-2024.] Abondolo denied that Catalano ever offered anybody's job back. [Tr. 1066.] In support of this denial, O'Leary testified that Quiles, in late-December, was being referred by the Union for temporary work assignments off the Union's shapers list. Quiles did not have enough seniority, among the hundreds of A&P employees who lost their jobs as a result of the bankruptcy, to obtain permanent work off the Union's permanent referral list. O'Leary estimated that about 350 butchers were on the referral list for permanent work in November. According to O'Leary, Abondolo would not have told Catalano he would get Quiles or Maffia a job somewhere else because that was not possible. O'Leary also testified that it was the Union's practice to communicate any and all offers of employment (for example, reinstatement offers to settle arbitrations) that are made to an employee and never to reject an offer of employment without talking to the employee. O'Leary stated that to do so could expose the Union to an unfair labor practice charge. [Tr. 2684-2695, 2699-2700] [GC 79].

On December 23, Catalano submitted a position statement to Region 29 which included the following [GC 78] [R. 28]:

Additionally, Richard Maffia was hired by HB Food Corp, for one day, was thereafter terminated by HB Food Corp., and he, along with Nelson Quiles, were subsequently offered employment by F113 Food Corp, through the auspices of Local 342. Mr. Abondolo of Local 342 specifically stated that they would either not return to HB Food Corp., or in the case of Mr. Quiles, not be hired by HB Food Corp. In short, Local 342 precluded their employment at HB Food Corp., thereby debunking any claim that their employment or prospective employment was somehow prevented by HB Food Corp, or that they were the subject of an anti-union animus. In fact, all employees hired by Key Food or the named entitles from A&P are in the same collective bargaining unit that they had been in when employed by A&P. Finally, to eliminate any doubt as to the fact that HB Food Corp. had offered employment to Nelson Quiles and/or Richard Maffia to be its Meat Manager, HB Food Corp, unconditionally, in this letter, offers employment to either one of them to be Its Meat Manager.

In a conversation that occurred after this position statement was submitted, Board attorney Noor Alam advised Catalano that the Region could not convey offers of employment to discriminatees. The evidence does not indicate that Respondent HB communicated the offer of employment directly to Maffia or Quiles. Likewise, the record does not indicate that the Region communicated the offer of employment to the Union. [Tr. 2020-2024.]

Respondent Seven Seas

Respondent Seven Seas is owned by Paul and Pat Conte. Pat Conte currently owns seven supermarkets, which are unionized.

The Contes have had bargaining relationships with Local 342 at various supermarkets since the 1970s. [Tr. 378, 2234-2238.] The Contes purchased three stores through the A&P bankruptcy, including the Union Square Food Emporium. A&P and the Union had a collective-bargaining agreement at the Union Square store covering a wall-to-wall bargaining unit. [Tr. 2239-2242.]

The A&P contracts contained provisions for full-time employees in a store that was closing to transfer into a different store on the basis of seniority. Some full-time employees transferred to Union Square. As a result, according to Pat Conte, Union Square had a large number of senior, highly paid, full-time employees. [Tr. 382-385, 656-660, 1081, 1271-1277, 1617].

Sharon Gowon was the store manager of the Union Square Food Emporium before the sale of that store to Respondent Seven Seas. Gowon came to work at Union Square as store manager in about February 2015 and was retained when Respondent Seven Seas took over. [Tr. 409, 620.] The store manager is the highest managerial position in the supermarket with authority to schedule, discipline, and fire employees. [Tr. 381.] The parties stipulated, and I find that Gowon was a supervisor of Respondent Seven Seas within the meaning of Section 2(11) of the Act. Gowon was not called by any party as a witness in this case.[23] [Tr. 406.]

Prior to coming to Union Square, Gowon was the store manager for a Food Emporium on 87th Street and Madison Avenue and, before that, the assistant manager of a Food Emporium on Sixth Avenue (both located in Manhattan, New York). Gowon may have worked at a different store between the time she left 87th Street and came to work at Union Square, but the record is not entirely clear. [Tr. 1215.] The evidence does not establish exactly how long Gowon worked at 87th Street or Sixth Avenue. [Tr. 619-620, 1188-1190.]

Union representative Margaret Monier was primarily responsible for administering the Local 342 contract at the Union Square Food Emporium. According to Monier, she represented Union Square employees from "about 2009 to when they closed." [Tr. 1187.] Monier was also responsible for the 87th Street and Sixth Avenue stores when Gowon worked at those locations. [Tr. 1188-1190.]

On November 7, LoIacono called Pat Conte and said "he knew that the store was very heavy and if we wanted to not hire anybody to make up a list and to send it to him." According to Pat, this "was music to my ears because I know the store was very over staffed." [Tr. 2260.] LoIacono did not deny the conversation.

On November 8, Pat Conte sent LoIacono a list of 17 employees (below) Respondent Seven Seas would not be hiring [R. 2] [GC 70, 72]:

Last Name	First Name	Department	Job Title
Callender	Cesar	Deli	Deli Clerk
Colon	Jose Carlos	Meat	Journeyman B
Delossantos	Francisco	Produce	Produce Clerk
Diaz	Juana	Grocery	Scanning Admin/Coordinator
Fields	Keesha	Bakery	Bakery Manager/Dir/Dept Head
Gomez	Madeline	Deli	Deli Clerk
Henderson	Sophie	Front End	Front-End/Customer Service Clerk
Iturralde	Dena	Front End	Cashier/Checker
Jones	Tamika	Floral	Floral Manager/Dept Head
Maldonado	Lucy	Seafood	Seafood Manager/Dept Head
Nunez	Ricardo	Grocery	Dairy Manager
O'Neal	Troy	Grocery	Night Stock/Packout Clerk
Ortega	Maria	Deli	Deli Clerk
Pagan	Elena	Front End	Cashier/Checker
Silverio	Rosa	Bakery	Bakery Clerk
Simpson	Jerry	Produce	Produce Clerk
Tirado	Natalie	Store Bakery	Bakery Clerk

Respondent Seven Seas ultimately hired the remaining A&P employees, which largely included employees who held the same job titles as the alleged refusal-to-hire discriminatees. For example, the Respondent hired part-time bakery clerk Wanda Barreto, but did not hire part-time bakery clerk and alleged discriminatee Silverio. [GC 70; Tr. 1610.] Alleged discriminatees Iturralde and Diaz appear to have been the only full-time employees who held their job titles at A&P, but Respondent Seven Seas hired part-time employees in those job classifications.[24] The record does not indicate whether Respondent Seven Seas replaced bakery manager Fields, but a number of bakery clerks were retained. The record does not indicate whether Respondent Seven Seas replaced floral manager Jones or retained any employees in the same department as Jones (if she worked in the floral department with other employees). [GC 70, 72.]

On November 9, Respondent Seven Seas formally purchased and took over the operation of the Union Square store. [Jt. 6.] On November 9 or 10, Respondent Seven Seas notified those A&P employees who were not going to be retained.

On December 26, Respondent Seven Seas laid off part-time scanning employee Ayanna Jordan without notifying or offering to bargain with the Union. [Tr. 170, 966, 1013, 1035-1036, 1456, 1629.]

Pat Conte was initially called as a witness by the General Counsel and questioned pursuant to Rule 611(c) of the Federal Rules of Evidence. Pat testified as follows with regard to the decision not to hire certain employees [Tr. 386]:
Q Okay. So you asked Sharon, though, to decide which of the employees would be hired and who wouldn't; is that correct?

A Yeah. Well, what we did ask her is which employees held promise and which seemed to be lackluster in their performance.

Q Okay. And so she made a list of you -- for you of these lackluster employees?

A She didn't make a list. She told us who she thought would not work out so well probably, and who was an excellent worker.

Q Okay. So -- and you relied on her representations?

A In most cases.

Later in the hearing, on direct examination by the Respondents' counsel, Pat Conte testified that he talked with two other former Food Emporium employees-- Director of Security Mac McBrien and Produce Clerk Santos Garcia--about which employees were most productive. According to Pat, McBrien was particularly well situated to know who was a good worker because McBrien watched security cameras all day. However, on cross examination, Pat admitted that he did not mention McBrien or Garcia in the affidavit he provided during the Regional investigation. Rather, his affidavit states, “someone from Seven Seas then asked Sharon Gowon who she recommended we hire out of the previous employees. Ms. Gowon thus provided a list of employees she believed were good and which were lackluster in their performance.” [Tr. 2260-2264, 2286-2287.] On cross-examination, Pat confirmed that Gowon “did give her opinion at times.” [Tr. 2287.]

Monier and Diaz testified that they received more complaints from employees and had more difficulty resolving those complaints after Gowon replaced the prior Union Square store manager, Kevin Smith. The most common problems the Union addressed with Gowon were scheduling and, to a lesser extent, safety issues. Monier called Gowon and also came to the store on a weekly basis to address such concerns. On her trips to the store, Monier sometimes walked around with the stewards and asked employees whether they had additional issues she needed to know about. Monier and the stewards spoke to Gowon about these concerns, but with little success resolving them. Accordingly, Monier often called Human Resources. Monier testified that she was more successful resolving issues with Human Resources than with Gowon. [Tr. 1193-1198, 1207.]

Protected Activity of Employees not Hired by Respondent Seven Seas and Evidence of Antiunion Animus

Tamika Jones, Union Steward - Jones was hired by Food Emporium on September 6, 1990 and transferred to the Union Square store on December 28, 1999. [Tr. 407-408.] Jones was the primary steward at Union Square from 2002 until the store transitioned to Key Food. According to Jones, scheduling issues were the most common complaints from employees and she received such complaints at least five times per week. She attempted to resolve those issues with Gowon, and sometimes did (but sometimes did not). When Jones could not resolve an issue with Gowon, she called Monier. If Monier came to the store in person, Jones accompanied Monier when she spoke to employees and Gowon. Jones estimated that these rounds took two or three hours. [Tr. 409-413, 442.]

Dena Iturralde, Assistant Union Steward - Iturralde was a self-checkout cashier and the formal assistant steward who assumed the position when Jones was absent. Iturralde called Monier when employees had a problem, which occurred about two or three times per week. If Monier came to the store, like Jones, Iturralde accompanied her when she spoke to employees and Gowon. [Tr. 458-464.]

Juana Diaz, Informal Assistant Union Steward - Diaz was a scanning administrator and assisted Jones in more of an unofficial capacity than Iturralde. [Tr. 618-619.] Diaz was the shop steward at the 87th Street store from about 1995 or 1996 until that store closed in December 2014. Diaz and other employees of the 87th Street store were transferred to Union Square. Diaz testified that employees who transferred with her from 87th Street often came to her with employment concerns instead of going to Jones or Iturralde. Diaz overlapped at 87th street with Gowon, who was the store manager for about a year before that store closed. [Tr. 618-620, 625-627, 635-638, 1192-1193.]

Diaz testified that she talked to Gowon about employee scheduling issues about seven or eight times per week and safety issues about one time per week. Diaz felt that Gowon was reluctant to change the schedule once it was prepared. According to Diaz, she had a particularly lengthy conflict with Gowon over the transfer of Gowon's niece (then an employee at 87th Street) to a night shift position at a different store. Gowon wanted an employee with more seniority than her niece to be transferred out of 87th Street, but Diaz objected. This was raised as an issue over the course of a couple of weeks until Gowon's niece was ultimately transferred instead of the more senior employee. [Tr. 6216-6223, 625-627.]

When Diaz transferred to Union Square, the Union Square store manager was Smith. Diaz had fewer problems with Smith than with Gowon when she replaced him. Gowon often asked Diaz why she was talking about employee complaints since she (Diaz) was not a steward. Diaz explained that employees from the 87th Street still came to her with issues, and Gowon did reluctantly speak to Diaz about these matters. [Tr. 619-620, 629, 635-638.]

In addition to acting as a de facto steward, Diaz objected when her own schedule was changed shortly after Gowon arrived at the Union Square store. Diaz was moved from a 7 am to 3:30 pm shift Monday through Friday plus five hours at time and a half pay on Sunday to an 8 am to 4:30 pm shift with a day off during the week, work on Saturday, and no Sunday hours at time and a half. Diaz called Monier and they spoke with Gowon about the matter together. Monier also spoke to Sean Grigals in Human Resources. Gowon claimed there was no scanning work to be done on Sunday, but Diaz was allowed to work on a cash register every other Sunday. Thereafter, Diaz learned that a less senior part-time scanner, Ayana Jordan, was doing scanning work on Sundays. Diaz complained, but Gowon refused to change her schedule. [Tr. 638-643, 1200-1207.]

Maria Ortega - Ortega was the Union Square café manager. [Tr. 518.] Although she was never a Union steward, Spanish speaking employees sometimes talked to Ortega about workplace complaints. Ortega would notify a steward or the Union of employee complaints, and sometimes translated for Spanish speaking employee in conversations with Gowon. [Tr. 528-529, 568.]

Monier sometimes called Ortega at work and these calls were publicly announced over the speaker system so Ortega could pick up the line in an office. Ortega transferred some of Monier's calls to Gowon. [Tr. 529-530.]

Ortega attended Union meetings and distributed Union materials she obtained at those meetings in the Union Square store during her lunch break. Ortega testified that she distributed these materials openly and that Gowon was in a position to see her doing so (as well as the Union logo on the literature). Ortega also testified that she told Gowon on at least one occasion, when she was waiting in the café' for the stewards, that she and the stewards were going to a Union meeting. [Tr. 521-525, 557-563.]

Ortega had certain workplace complaints of her own that she brought to the Union's attention and the Union, in turn, raised with Gowon. In the winter before the sale of the Union Square store, Ortega repeatedly complained for nearly a month that the café where she worked was cold because it was next to a door that was broken and remained open. Gowon did not have the door fixed and Ortega notified Monier. Monier came to the store and spoke to Gowon, who closed the broken door that day.

However, the door was kept open thereafter and Monier reported the matter to Human Resources. According to Monier, the door was not permanently shut until she complained to Human Resources. [Tr. 530-534.]

In about August or September, Ortega was removed from the Sunday schedule and replaced by part-time employees. Previously, she worked every Sunday. Ortega and stewards complained to Gowon about this several times. Gowon sometimes said she did not need Ortega on Sundays and sometimes simply walked away without saying anything. Monier came to the store to address the matter, but Gowon refused to schedule Ortega to work Sundays. [Tr. 421-422, 464-468, 519, 533-541.]

On about November 6, Gowon told Ortega to clean the walls of the café' because the store had been sold. Ortega said she could not clean the walls because she was constantly waiting on customers. Gowon walked away, but Ortega followed her and called Iturralde over (who was nearby). Ortega asked Gowon to schedule her for four hours on Sunday to clean the walls. Gowon said Sunday is not for cleaning. Iturralde asked Gowon why she did not want to schedule Ortega to work on Sundays, but Gowon just laughed and walked away. [Tr. 541-544, 557-563.]

Jose Carlos Colon - Colon was a butcher in the meat department at Union Square. Jones spoke to Gowon about Colon being scheduled for "split shifts" or different hours on different days of the week. Monier also spoke to Gowon about Colon being assigned a later shift than he was entitled to on the basis of his seniority. The evidence does not indicate exactly when these issues arose, but they occurred at Union Square when Gowon was General Manager (i.e. 2015). [Tr. 420-421, 629-633, 1229-1230.]

Keesha Fields - Fields worked in the 87th Street Store as the bakery manager for about five or six years and Gowon was the store manager there for about the last six months. Fields transferred to the Union Square store a few months before Gowon did. In April or May, Fields requested leave to have wrist surgery. According to Fields, Gowon "was giving me a hard time about that." Gowon said she had the same problem and it did not require an operation. Gowon also asked Fields who was going to run the department while she was on leave. Fields told Jones about her leave request and Monier spoke to Gowon. Gowon refused to give Fields the time off she needed and Monier contacted Human Resources. Human Resources agreed to give Fields the time off. Fields took about one and a half weeks off for the surgery. [Tr. 419-420, 490-493, 1208-1209.]

According to Fields, after she returned from the operation, Gowon began treating her differently. Fields testified that Gowon had a problem if she came in five minutes late or had difficulty getting product out on the floor on time. Fields admitted that she was a little slower getting food out on the floor following her operation. [Tr. 493-495, 503-504.]

Madeline Gomez - Gomez worked in the 87th Street floral department before she was transferred to Union Square and assigned to the deli in about December 2014. Monier testified that, initially, Gomez was allowed to make sandwiches or hot food and was not required to use the deli slicer. However, according to Monier, Gowon required Gomez to operate the slicer when she (Gowon) came to the Union Square store. Monier told Gowon that Gomez did not know how to use the deli slicer, but Gowon just said, "there's nothing I can do about it. This is her job that she has to do." Monier contacted a manager in Human Resources and he agreed to train Gomez on the slicer for as long as she needed in order to get comfortable working with it. [Tr. 1217-1223.]

According to Monier, Gomez complained about several other safety issues at Union Square, such as exposed wiring and a problem with the slicer's safety switch. Monier estimated that Gomez called her about four times in 2015. Monier came to the store each time and had Gomez show the problems to her, the stewards, and Gowon. Monier testified that Gowon's body language indicated she was not happy in that she would tap her foot, fold her arms and/or storm off without saying anything. On these occasions, Gowon also asked Gomez, "why didn't you just speak to me about it? Why do you have to call Margaret? I'll take care of it." [Tr. 1217-1223.]

Jones testified that she too spoke to Gowon about Gomez because Gomez was not always assigned to work two Sundays per month. [Tr. 416-419.]

Lucy Maldonado - Maldonado was the seafood manager at Union Square. In about early-2015, Maldonado called Monier and said her vacation time was incorrect. Monier called Gowon, who said she would look into it. Monier followed up with Gowon, but Gowon said she still did not have any information. Monier then contacted human resources. Maldonado was subsequently injured at work and went out on workers compensation. Monier did not know how or whether Maldonado's vacation issue was resolved. [Tr. 1228-1229.]

Ricardo Nunez - Nunez was the dairy manager at Union Square and also worked with Gowon at the Sixth Avenue store. In about May 2010, at the Sixth Avenue store when Gowon was the assistant manager, Nunez complained to Monier that he was not being paid correctly. Monier testified that Gowon handled most of the personnel matters at the Sixth Avenue A&P store even though she was the assistant manager. Monier asked Gowon to correct Nunez's pay. Gowon told Monier she would do it, but did not. Monier contacted Human Resources and Human Resources corrected the error. Nunez received retroactive pay in the amount of $1,335.83. [GC 54, 70, 72] [Tr. 1225-1227].

Elena Pagan - Monier testified that Pagan was a deli clerk who was bumped from full-time to a part-time position and then complained she was not receiving the minimum number of hours for a part-time employee. According to Monier, this occurred a few weeks after Gowon arrived at the store. Monier talked to Gowon about Pagan not receiving the minimum hours, but could not resolve the issue. Monier then contacted Human Resources and was able to resolve it. Monier testified that the Union also grieved the reduction of some employees from full-time to part-time, but did not recall whether Pagan was covered by that grievance. [Tr. 1223-1225, 1270, 1294.]

Rosa Silverio - Silverio worked in the Union Square bakery. Juana Diaz testified that she talked to Gowon every week about Silverio's scheduling. According to Diaz, Gowon often scheduled a less senior employee named Erma for hours "before" Silverio.[25] Further, in about the summer of 2015, Gowon refused to authorize Silverio to take a day off to have her home inspected. Jones had a meeting with Gowon about this issue and Diaz was present. Gowon initially objected to the presence of two shop stewards (Jones and Diaz), but ultimately allowed Diaz to stay as a Spanish speaking interpreter for Silverio. The parties apparently resolved the issue since, according to Diaz, Silverio took the time off. [Tr. 631-632, 644-646, 1207.]

Jerry Simpson - According to Monier, Simpson complained that part-time employees were being scheduled for hours he should have received as a full-time employee. Monier testified that she thought Simpson raised these complaints in 2014 (before Gowon arrived at Union Square), but later testified that it could have occurred in 2015. [Tr. 1235.]

Natalie Tirado - Tirado was a cashier at the 87th Street Store who had an accommodation to sit down while performing her job because she had bad knees. Gowon was the store manager at 87th Street. When the 87th Street store closed, Tirado was transferred to Union Square. However, Gowon designated Tirado for transfer to the Union Square bakery department, where she was not able to sit. Monier asked Gowon why Tirado was not transferred to a cashier position at Union Square, but Gowon merely said, "that is where I placed her." Monier talked to Smith (then the store manager of Union Square) and Human Resources. Smith said he had other spots available where Tirado could work while seated, and moved her to a cashier position. [Tr. 1213-1216.]

Additional Evidence Presented by the General Counsel in Support of a Finding of Antiunion Animus

Monier testified that Gowon often appeared angry when she was told of employee complaints. According to Monier, Gowon also asked employees why they did not come talk to her directly instead of contacting the Union. In response, Monier told Gowon that employees would not need to call the Union if she fixed things in the first place. [Tr. 1191-1192.]

In about September, after A&P declared bankruptcy, Monier went to the Union Square store to see if employees had any questions. On Monier's way out of the store after the visit, Gowon asked her, "why are you even here you know ... [t]hey don't have a union anymore. ... [Y]ou don't have to come see them anymore." Monier said, "yes, they do have a union." [Tr. 1190.]

In about October or early-November, before Respondent Seven Seas purchased the Union Square store, Iturralde heard Gowon say "the union is full of shit." Iturralde asked Gowon why she said that, and Gowon responded, "well, you don't see them here for you guys now, so, they're full of crap." [Tr. 468-469.]

Respondents Albany Avenue and Greaves Lane

Respondents Albany Avenue and Greaves Lane are owned by Sam and Randy Abed. Respondent Albany Avenue purchased and assumed the operation of the Pathmark on Albany Avenue in Brooklyn, New York on November 16. Respondent Greaves Lane purchased and assumed the operation of the Pathmark on Greaves Lane and Amboy Road in Staten Island, New York on November 24. [Jt. 6.] Respondents Albany Avenue and Greaves Lane hired all the former Pathmark employees at their current rate of pay. [Tr. 599-600, 604-605.]

Robert Jenzen was the deli manager at Albany Avenue when the store transitioned to Key Food. He earned $23.19 per hour and worked 7 am to 3:30 pm Monday through Friday as well as 5 hours on Sunday from 7 am to 12 pm.

Stephen Fiore was the meat manager at Albany Avenue when the store transitioned to Key Food. He earned $31.33 per hour and worked the same schedule as Jenzen.

O'Neil Lyons was a butcher at Albany Avenue when the store transitioned to Key Food.

Randy Abed testified that, after Respondent Greaves Lane assumed the operation, payroll had to be cut because the store was not doing the business they anticipated. Accordingly, shortly after Thanksgiving, Respondent Greaves Lane reduced employees' days of work from six to five. [Tr. 605.]

In about the middle of the first week, Greaves Lane store manager Steve Rabino told meat cutter and Union shop steward Michael Fischetti that unit employees were going to be given an extra day off. [Tr. 709-711.]

Anthony Venditti, a Greaves Lane meat cutter and assistant steward, learned about the extra day off from meat manager Dominic Deverso. Venditti approached Rabino and asked whether there were any other changes he needed to know about. Rabino said he would check with the new owners. [Tr. 739-741.]

On November 28, Respondent Albany Avenue laid off butcher Joseph Batiste and apprentice meat cutter Kalvin Harris without notifying or offering to bargain with the Union. [Tr. 171, 596-599, 967, 1014, 1456.]

On November 28, Respondent Greaves Lane laid off deli manager Gina Cammarano and seafood Manager Debra Abruzzese without notifying or offering to bargain with the Union. Abruzzese reported her layoff to Venditti (Abruzzese's fiancé), and Venditti asked Rabino why Abruzzese had been laid off. Rabino just said he was told to lay off Abruzzese and Cammarano. Venditti asked Rabino what was going on, but Rabino shrugged. [Tr. 170, 966, 1014, 1366-1367, 1456-1457, 2359.]

On about November 29, the Union engaged in handbilling in front of the Greaves Lane store from about 10 am to 2 or 3 pm. Venditti was the acting shop steward that day because Fischetti was on leave. Monier was present for the handbilling. During Venditti's 15-minute break at about noon, he went outside to hand out leaflets and speak to customers. According to Venditti, the leaflets indicated that the new owners laid employees off out of order of seniority and changed employees' working conditions. Monier testified that she saw owner Randy Abed watching the handbillers nearly the entire day either from inside the store looking out the front windows or from outside the store. According to Monier, when Venditti was outside, Randy was clearly watching him. Monier also testified that Randy was "videoing, taking pictures." Monier thought Venditti stood out among the handbillers because he is a "big guy, very tall," was wearing a white meat cutter's coat, and several customers were speaking to him. [Tr. 746-748, 1239-1246].

On about this first day of handbilling, Abondolo called Sam Abed and asked him to fix the situation by signing a transition agreement. Sam told Abondolo he was not allowed to do anything without Key Food. According to Abondolo, Sam said he had signed an agreement that would result in him losing money if he signed a contract with the Union independently of Key Food and the other stores. Abondolo told Sam the Union demonstration outside the store was happening because Respondent Greaves Lane laid off the deli and seafood manager. Sam replied that he could not afford to retain those employees because their wage rates were too high. Sam said he was thinking of laying off six or seven other employees, including Fischetti and Venditti. Abondolo offered to take the picket line down if nobody else was laid off and the Abeds would sit down and talk with the Union about working something out. Sam said, "okay." Sam then went outside and told Monier that Abondolo had agreed to take the line down. Monier called Abondolo and he instructed her to stop handbilling. [Tr. 604, 1008-1012.]

On about the next day, November 30, Respondent Greaves Lane laid off Venditti and Fischetti. When Venditti arrived for work, he was called in to speak with Sam and Randy Abed. Randy asked Venditti if he had spoken to Abondolo. Abondolo said he had no reason to speak to him. Randy said, going forward, they would only negotiate with Abondolo and nobody else. Venditti did not understand the comment and did not respond. The Abeds then told Venditti they were letting him go because the store was not doing enough business. Venditti noted that the store had only been open a week and asked how they could tell if the store was going to do business. The Abeds simply reiterated that the store was not doing enough business. [Tr. 746-747.]

Randy Abed testified that Venditti and Fischetti were selected for layoff because they were the least senior employees. However, Greaves Lane Butcher Justin Conti testified that he and butcher Vaughn Young had less seniority with the store than Venditti and Fischetti. A roster that was provided to the Abeds before they purchased the store confirms that Venditti and Fischetti were not least senior among butchers. According to this roster, Coughlin was hired on July 17, 2000 and Young was hired on May 26, 2000. Young did not become a full-time employee until August 14, 2006. Venditti was hired as a full-time butcher on July 10, 1995 and Fischetti was hired as a full-time butcher on September 19, 1994. [GC 72] [Tr. 2613].

About a week or two after Venditti and Fischetti were laid off, the Union resumed handbilling at Greaves Lane.[26] [Tr. 1248.] On about the day handbilling resumed, according to Greaves Lane assistant seafood Manager Chris Coughlin, Sam Abed threatened to fire him if he went outside to join the Union. Coughlin said "okay" and never went outside to join the Union. [Tr. 2635.]

Conti also testified that Sam Abed threatened to fire him if he engaged in handbilling. According to Conti, on December 1, Sam came into the meat locker where he was working with deli first person Monserrate Reyes and butcher Antonio Giuffre.[27] Abed said he knew the Union was asking them to stand outside on their lunch breaks, but anyone who went outside would not be allowed back in the store. Giuffre and Conti both told Abed he could not tell them what to do during their lunch break and that he was putting them in a difficult position of choosing between the Union and their jobs. Abed told them it was not a hard decision at all; you can go out and have no job or you can refuse to stand on the line with the Union and continue having a job. About 20 minutes later, Sam came back and told them to work straight through lunch, which they did. Toward the end of the day, Sam told Giuffre and Conti they would be fired if they joined the union demonstration at the end of their shifts. Again, Giuffre and Conti told Sam he could not tell them what to do on their own time. After his shift ended, Conti removed his hat (which he always wears at work), rearranged his hair, changed his shirt and put on sunglasses in an attempt to disguise himself. He then joined the handbilling. Giuffre also engaged in the handbilling. Conti testified that Sam came outside several times and looked at him but did not give any indication that he (Sam) recognized Conti as an employee. Conti also testified that Randy videotaped him and Giuffre outside. Conti continued to participate every day the Union handbilled over the next 2 weeks. [Tr. 2614-2616.]

Sam Abed testified that he had no knowledge of employees' union activities and did not lay off employees on that basis. [Tr. 2325-2331.] Otherwise, Sam did not deny specific events and statements that were testified to by Fischetti, Venditti, Coughlin, Conti and/or Monier. Randy Abed was not called as a witness by the Respondents.

Conti also testified to separations and hiring in the Greaves Lane meat department after Venditti and Fischetti were laid off. According to Conti, meat manager Dominick D'Aversa was fired a few weeks later and was replaced the same day by an individual named Phil who previously worked at a different Pathmark store. Young resigned and was replaced by a cutter named

Gene who previously worked at a different Pathmark store. As noted above, Giuffre was transferred from Greaves Lane to Albany Avenue around Christmas. In about April 2016, Phil was fired and a meat cutter named Musa was hired. When Phil was fired, Conti was promoted to the meat manager job without an increase in pay. Conti testified that Musa worked six days per week from 10 to 12 hours per day without overtime. Meanwhile Conti was removed from the Sunday schedule. Sam told Conti he was removed from the Sunday schedule because they did not pay Musa the overtime rate. In about late-April 2016, Greaves Lane hired a meat supervisor. In about June 2016, Conti resigned because he was transferred to the night shift and had a child care conflict.

Sam Abed testified that he believed the October 22 MOA was in effect and the MOA provided that employees who were laid off would have recall rights. [GC 16] [Tr. 2328]. Neither Venditti nor Fischetti were recalled to work by Greaves Lane. [Tr. 2619-224.]

In about late-December, the Respondents transferred Giuffre and meat wrapper Sharon Luciano from the Greaves Lane store to the Albany Avenue store. Albany Avenue payroll records show that Luciano received her first paycheck on December 24 and Giuffre received his first pay check on December 31. Meanwhile, according to Fiore, Lyons was temporarily transferred from Albany Avenue to Greaves Lane between late-December and January 2016. Albany Avenue schedules show that Lyons was on the schedule for the period ending December 26, 2017, off the schedule the next 2 weeks, and back on the schedule for the week ending January 23, 2016. [Jt. 7.] Fiore noted that Lyons was sent to Greaves Lane in Staten Island even though he lived in Brooklyn and Giuffre was sent to Brooklyn even though he lived in Staten Island. [Tr. 1138-1142.]

After Christmas, Randy Abed told Jenzen his hours were being reduced. Randy offered Jenzen the option of not working Sundays or having his schedule changed from 40 to 35 hours during the week. Jenzen decided to stop working Sundays. Nevertheless, two weeks later, Jenzen's weekly hours were reduced from 40 to 35 hours as well. Respondent Albany Avenue did not notify or offer to bargain with the Union before cutting Jenzen's hours on these two occasions. [Tr. 1370, 1566-1567.]

In about early-January 2016, after handbilling had begun at Albany Avenue, Sam Abed approached Fiore and told him he cannot leaflet on company time "or else that's going to be a problem for you." Fiore testified that he participated in union handbilling at Albany Avenue about six times during his half-hour lunch breaks and after work. In about the same time-period, Fiore also engaged in handbilling at the Greaves Lane store on his day off. Fiore testified that, on this occasion, Sam walked into the Greaves Lane store about 10 feet from where he was handbilling. While handbilling at the Albany Avenue store, Fiore wore a cardboard placard that said Local 342 and told customers the store was a nonunion shop that did not have a union contract. Fiore testified that Randy Abed was outside the Albany Avenue store with a megaphone at least 1 day during the union handbilling. Randy said through the megaphone that the Union was lying and the store was a union shop. According to Fiore, at the Albany Avenue store, Randy stood about 50 feet from him and could see him handbilling with an unobstructed view. [Tr. 1145-1149.] Sam and Randy did not deny these facts.

Union handbills distributed at the Albany Avenue and Greaves Lane stores requested that customers not shop at the stores because unfair labor practice charges were found to have merit and a trial would be conducted regarding the case. [GC 34] [Tr. 1161-1164, 1277-1284].

In about January 2016, Respondent Albany Avenue distributed to employees a document called "Key Food Rules & Regulations" and a Key Food application. Albany Avenue store manager Mike Carlos told employees they had to sign the Rules & Regulations and fill out the application or they would not have a job. [Tr. 1154-1155.] These Rules & Regulations contained the following provisions [GC 25]:

SOLICITATION

Solicitation is defined as the selling of merchandise or services, charitable contributions petitions of any nature, illegal gambling items, etc. Employees may not directly or indirectly solicit other associates for any purpose during scheduled work hours while

on company property, Non-Employees are not authorized on company premises at any time for the purpose of soliciting Key Food. Employees who are approached by a non-associate soliciting on company property should immediately report this to store management.

POLITICS:

YOUR COMPANY ENCOURAGES YOUR PARTICIPATION IN THE POLITICAL PROCESS. HOWEVER, SUCH ACTIVITY SHOULD BE RESTRICTED TO YOUR OWN TIME AND BE CONDUCTED AWAY FROM COMPANY PROPERTY. NO POLITICAL OR LEGISLATIVE PETITIONS SHALL BE CIRCULATED ON COMPANY PROPERTY

There is to be no loitering in any specific department at any time. (example: no loitering in the deli department company time or off company time. no loitering in any department on your day off.)

IT IS IMPOSSIBLE TO COVER EVERY SINGLE ACT OR MATTER: HOWEVER, ALL EMPLOYEES ARE EXPECTED TO CONDUCT THEMSELVES PROPERLY AT ALL TIME. IMPROPER CONDUCT OR MATTERS, EVEN THOUGH NOT SPECIFICALLY MENTIONED HEREIN, WILL SUBJECT THE EMPLOYEE TO DISCIPLINE.

On about January 16, 2016, Sam Abed told Fiore he was being demoted from meat manager to butcher and would have his hours reduced from 40 to 35 hours with no Sundays because he (Fiore) was making too much money. Sam did not deny this. Fiore thought his pay would be reduced from $31.33 to the "A Butcher" rate of $29.55, but his pay was reduced to $25 per hour instead. When Fiore realized his pay was being reduced to $25 instead of $29.55 per hour, he asked Carlos about his pay and Carlos referred him to Sam. Fiore texted and left voice mail messages for Sam but received no response. [Tr. 1155-1158.]

Fiore testified that, when he was demoted, Lyons was transferred back from Greaves Lane to replace him as the meat manager. According to Fiore, when he returned to Albany Avenue, Lyons was earning $20 or $25 per hour (not Fiore's meat manager rate of $31.33).[28] Albany Avenue schedules confirm that Lyons returned to the store and was on the schedule for the week ending January 23, 2016. The schedules also show that Lyons, upon his returned, was scheduled to work more than 40 hours per week while Fiore was scheduled to work 35 hours. [Jt. 7-8] [Tr. 1155-1158].

Fiore testified that he never received any sort of written or verbal discipline or reprimand while employed by Respondent Albany Avenue. [Tr. 1152-1153.] Sam Abed testified that Fiore was written up several times and demoted but could not find all those disciplinary records.[29] [Tr. 802.]

On January 30, 2016, Respondent Albany Avenue laid off Fiore and Jenzen without notifying and offering to bargain with the Union. Randy Abed told Jenzen the store could no longer afford to pay him. At trial, Fiore testified that Randy told him his services were no longer needed without providing a reason. In an affidavit Fiore provided to the Region, Fiore indicated that Randy said, "the meat department was not working out the way that they wanted it to and that he was going to have to let me go." [Tr. 171, 967, 1014, 1369, 1167.]

Schedules and payroll records indicate that Respondent Albany Avenue added another meat department employee named Anthony Remo in February 2016.[30] Like Lyons and unlike Fiore, Remo was scheduled to work more than 40 hours per week. [Jt. 7-8.]

Albany Avenue payroll records indicate that gross pay for the meat department actually went up after Fiore was laid off. On the pay dates of January 21, 2016 and January 28, 2016, gross pay for the meat department employees was $4,324.86 and $4,360.16, respectively. On the pay dates of February 11, 2016 and February 18, 2016, gross pay for meat department employees was $4,488.98 and $5,153.08, respectively. [Jt. 8.]

The Abeds called the police every day the Union handbilled at one of their stores. At some point, the Abeds prepared their own handbills and handed them out to customers. [Tr. 604, 608-610, 1248] [GC 33-35, 56].

Respondent CS2

CS2 (owned by Respondent Key Food) purchased and assumed the operation of the Waldbaums supermarket on Francis Lewis Boulevard in Bayside, New York on November 2.

Full-time butcher Mariano Rosado was among the Waldbaums employees that CS2 hired when the store transitioned to Key Food. On about January 3, 2016, store manager Larry Johnson gave Rosado a severance agreement and told him he had seven days to sign in or he would lose his severance. [Tr. 1325-1326.] Rosado consulted Fontanez, who advised Rosado not to sign the severance agreement. Rosado signed the severance agreement anyway and received an $8000 severance payment. [Tr. 1333.] CS2 never notified the Union directly that employees would be presented with severance agreements and did not provide the Union with a copy of the severance agreement. [Tr. 170-171, 966-967, 1013-1014, 1366-1369, 1456-1458.] By email to Catalano on January 26, 2016, O'Leary objected to Key Food stores dealing directly with employees by issuing severance agreements to Rosado and one other employee. Catalano responded the same day, indicating that he would "determine the facts,..." [GC 23.]

The record does not indicate that any of the named employees at issue in this case, other than Rosado, received severance from the Respondents. [Tr. 427, 470, 580, 653, 715, 748, 1159, 1496, 1572.]

End of Negotiations

On November 19, during a bargaining session, the parties largely reaffirmed their positions. Catalano indicated he could accept a severance provision for part-timers but stated (as he had before) that the stores intended to keep the part-time employees. Catalano also indicated that he could accept a provision regarding full-pay for the first hour of work each week. The Union reiterated its position on severance that the new Key Food employers would make up the difference of any shortfall if A&P did not pay severance, noting that employees hired by A&P after certain dates were not entitled to severance. Thus, A&P would pay $400 per year and the Respondents would pay $400 per year for employees hired before the severance cutoff date, while the Respondents would pay the full $800 per year (with no A&P severance) for employees hired after the severance cutoff date. The Union also indicated that all laid off employees should be reinstated. [GC 51.]

O'Leary testified that, after the November 19 bargaining session, Catalano called her and said negotiations were suspended because the picket lines went up. [Tr. 158-161.]

On November 22, by text, Solicito asked Catalano to schedule another bargaining session the next day. Catalano responded, "No I have a hearing but pull the pickets." Solicito asked whether Catalano was refusing to meet because of the picket lines, and Catalano responded "No we can meet after Thanksgiving--are you thinking that my guys will give in because of your threats? No chance...." Catalano also asked Solicito to "put in writing your proposals...." [GC 52.]

On November 24, the Union emailed the Respondents a revised "Transition Agreement Proposal," which modified the "Offer of Employment" provision to read as follows [GC 20]:
a. The employer agrees to offer a buy out to any full time employee who was employed by A&P prior to being hired by the employer, who is terminated for any reason during the probationary period and/or for just cause anytime thereafter. In such instance the employer shall pay to the employee S800 per week for each year of service with A&P if that employee did not receive severance from A&P. For employees who received A&P severance, the employer shall pay those employees S400.00 for each year of service with A&P. This includes employees the employer let go or submitted to be let go by A&P prior to the acquisition.

b. Layoffs shall be by seniority (the last employee hired shall be the first employee laid off) within classification. In case a buy-out results from a layoff, the affected employee shall have the right of recall) for a period of one year, and shall be entitled to receive the highest rate of pay he or she received prior to the layoff regardless of any payments received from a buy-out as described paragraph "a" above. For purposes of layoff, A&P employees subject to this agreement will keep their original A&P Company hire date within the acquired group or store.

The Union's November 24 proposal also modified the probationary period proposal to provide that employees terminated during probation would receive the buyout described in paragraph (a) of the Offer of Employment, eliminated a provision for buyouts to be paid to part-time employees, added a provision that restricted the use of part-time cutters, added a provision requiring newly hired meat employees to be paid at least $10 per hour, altered the healthcare provision, reduced contributions to the retirement annuity fund for each full-time employee from $200 to $140, added provisions for contributions to a Legal Fund and a Safety Education and Cultural Fund, added a provision restricting the use of part-time cutters, reduced the number of department heads to one department head for each department, reduced the duration of the contract to 36 months, and incorporated by reference "additional terms" from the Key Food industry agreement.

On November 25, Konzelman responded by email to the Union's November 24 proposal provision by provision. With regard to the "Offer of Employment" provision, Konzelman stated that the "language is ambiguous," but otherwise agreed to the concept of $800 severance for each year of service with Key Food paying $800 for employees who did not receive severance from A&P and $400 for employees who did receive severance from A&P. The union buyout language referred to any former A&P employee "who is terminated for any reason during the probationary period and/or for just cause anytime thereafter," whereas Konzelmen countered that payments would "only be provided to those employees who were not hired by our Members." Nevertheless, Konzelman accepted the Union's probationary period proposal, which applied the buyout provision to employees terminated during the probationary period. Konzelman countered that part-time cutters needed to work at least 32 hours per week on average to receive healthcare coverage,[31] a $10-per-month contribution to the Safety Educational and Cultural Fund, a $5 contribution to the Legal Fund, arbitration with AAA unless an arbitrator is otherwise agreed upon, a minimum of only one department head for back-wall stores (even if Local 342 represents multiple departments), expanding the allowable use of part-time cutters, a contract duration of 42-months, a no-strike clause that prohibits "hand billing, informational picketing, or depictions during the length of the CBA," and a union security clause that did not require the termination of an employee upon termination of union membership. In addition, Konzelman indicated that references "to the A&P or Key Food industry agreements should be deleted, and certain of those [additional terms] listed need to be discussed." Konzelman agreed to the Union's proposals with regard to hours, wages, paid time off, Annuity Fund, breaks, overtime, union visitation, four hours minimum overtime, funds, funeral leave, jury duty and shop stewards. [GC 21.]

On November 27, Abondolo responded by email to Konzelman as follows [GC 21]:
There is very little we are willing to change, you were able to achieve most of your ask there are certain things that we will need regardless

The most important of all is the list of people we have for severance we need to get that agreed on before we talk about changes if an at all

A list of people with the amounts will be sent today and you could let us know that its agreeable or if there is any problems Our understanding is that all that were in the store working that your people fired will receive severance of 800 per year of service or 400 per year of service with the AP depending on their status where they fall in our formula with no cap, and the employee will be required to sign an acceptable release that's what we understand is the proposal

In letters dated December 1, 2015, O'Leary wrote directly to the member-owners and demanded bargaining independent of Respondent Key Food. [GC 22.] Catalano responded that O'Leary had no right to bypass him and contact individual owners directly. [Tr. 175] [GC 23].

Nevertheless, in December, Solicito and LoIacono met with Paul and Pat Conte. According to LoIacono, Paul Conte complained that Sunday overtime was very expensive.

The Union indicated it would not bargain away the benefits of current employees but would discuss new hires. Paul said there is nothing to work out because Local 342 employees "don't cooperate like other stores" in that they will not work off the books. Paul then abruptly said he had a doctor's appointment and ended the meeting. [Tr. 1454-1456.]

After the Respondents took over the operation of their respective stores, certain stores attempted to forward dues and welfare fund contributions pursuant to the provisions in the MOA. The Union and the welfare fund rejected this money on the grounds that it did not have contracts with the Respondents. As a result of the rejected contributions, employees at the Respondents stores lost medical coverage through the Union's welfare fund. [Tr. 1179-1181, 1908, 2108-2111, 2332-2333, 2482, 2779-2781.]

According to O'Leary, in about February 2016, she called Catalano and asked for bargaining dates. O'Leary testified that Catalano refused to agree to dates because the parties "had a deal." [Tr. 180.] Catalano denies that the Union contacted him for bargaining dates from Thanksgiving to June 2016. [Tr. 2055.]

On June 27, 2016, O'Leary sent Konzelman and Catalano an email indicating the Union was available for bargaining on certain dates in July 2016. O'Leary followed up with emails on June 30, July 1, 5 and 6, 2016, but received no response. On July 7, 2016, O'Leary sent an email to Catalano confirming, as follows, a phone conversation earlier that morning [GC 24]:
I send this email to memorialize our phone conversation this morning, wherein you advised me that your legal position, on behalf of Key Food, is that there is a contract with Local 342 already and thus there is no need to bargain. You stated that Local 342 had a Complaint issued and so you were going to litigate it. Local 342 will respond accordingly to the employer's refusal to bargain. Please be advised that Local 342's demand to bargain is continuing, as our position is there is no contract, there is no impasse, and that Key Food has the obligation to bargain with Local 342 in good faith to reach a mutual agreement. Local 342 suggests that the employer rethink its position, and meet to bargain with FMCS facilitating/assisting with the bargaining. Thank you for taking my call this morning, and should Key Food wish to bargain in the future please contact me for dates.

ANALYSIS AND CONCLUSIONS

i. section 8(a)(5) and (1) allegations

Unilateral Layoffs

The General Counsel contends that the Respondents unilaterally laid off 13 employees without notifying and offering to bargain with the Union over those layoff decisions in violation of Section 8(a)(5) and (1) of the Act.

It is well settled that the decision to lay off employees is a mandatory subject of bargaining. *N.K. Parker Transport*, 332 NLRB 547, 551 (2000); *Winchell Co.*, 315 NLRB 526, 530 (1994); *Holmes & Narver,* 309 NLRB 146, (1992*); NLRB v. Advertisers Mfg. Co.*, 823 F2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works is a dramatic change in their working conditions" and thus "[l]ayoffs are not a management prerogative [but] a mandatory subject of collective bargaining"). Where a layoff occurs solely for economic reasons, the union has the right to bargain over the layoff decision itself and not just the effects of that decision. *Lapeer Foundry & Machine*, 289 NLRB 952, 953-954 (1988).

The Respondents raise a number of defenses to the allegation that they failed to notify and bargain with the Union regarding layoffs. First, the Respondents contend that the parties agreed to a contract which entitled them to unilaterally lay off employees at their discretion as long as the severed employees were paid a monetary buyout. That is, the Union allegedly entered into a collective-bargaining agreement that, through the buyout provision, waived its right to bargain over future layoffs. Second, regardless of the existence of a contract, the Respondents contend that they were entitled to unilaterally set initial terms and conditions of employment, including the buyout provision. Third, the Respondents contend that they did, in fact, engage in bargaining over the layoffs. For reasons discussed below, I reject the Respondents defenses and find that the Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally laying off employees.

The Existence of a Collective-Bargaining Agreement

The party relying on a contract has the burden of proving its existence. *H. Koch & Sons*, 220 NLRB 1103, 1109 (1975). This burden requires proof by objective evidence that negotiations manifested a "meeting of the minds" as to all substantive issues and materials terms. *Crittenton Hospital*, 343 NLRB 717, 718 (2004).

As discussed below, I find that the Respondents failed to establish by a preponderance of the evidence the existence of a contract containing a union waiver of its right to bargain over layoffs. However, I initially note that the Respondents' burden of establishing a waiver is one of "clear and unmistakable" evidence rather than a "preponderance of the evidence." National labor policy favors bargaining and "disfavors waivers of statutory rights by unions." *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2nd Cir. 1982) cited with approval in *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). See also *Suffolk Child Development Center, Inc.*, 277 NLRB 1345, 1349 (1985); *Harte & Co.*, 278 NLRB 947, 950 (1986). Accordingly, "before a waiver of a duty to bargain can be found, there must be clear and unmistakable evidence of the parties' intent to waive this right" and "such evidence is gleaned from an examination of all the surrounding circumstances including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement." *Columbus Electric Co.*, 270 NLRB 686 (1984). Thus, the party relying on a bargaining waiver must not only prove by clear and unmistakable evidence that the contract language confirms such an intent but must also establish by clear and unmistakable evidence that the contract containing such language was actually agreed upon and in effect. Often, the existence of a contract is not in question, but here it is.

The Respondents contend that Abondolo agreed to their contract proposal during a side-discussion with Catalano on October 21 and that the October 22 MOA reflected this agreement. The MOA consisted of the September 22 proposal and additional provisions that appear to be derived from, but were not identical to, certain clauses in the Key Food industry agreement. The MOA also indicated that certain additional terms would be included in the final collective-bargaining agreement, presumably after additional negotiations. Therefore, the Respondent effectively claims that there was a verbal modification of its September 22 proposal between the date of that proposal and October 21 such as to include additional provisions and reserve other provisions for bargaining at a later date. However, this assertion is at odds with Catalano's testimony that he understood Abondolo, during their side-discussion on October 21, to have accepted the Respondents' September 22 proposal with the exception of a single modification to the buyout provision.

Catalano's notes of the October 19 bargaining session do indicate that the parties verbally reviewed the Respondents' proposal of September 22 and the Key Food Industry agreement. Catalano entertained the idea of using certain non-economic provisions of the Key Food industry agreement to supplement the September 22 proposal, but rejected the Union's proposal to use the entire industry agreement unless the parties specifically agreed to something different. O'Leary entertained the idea of using portions of the Key Food industry agreement to supplement the Respondents' September 22 proposal, but did not agree to the entire September 22 proposal or to forgo certain provisions of the Key Food industry agreement that addressed subjects not contained in the September 22 proposal. Likewise, the evidence does not establish that the parties agreed to include in a contract certain provisions from the Key Food industry agreement as modified by the MOA (e.g., Jury duty leave reduced from 30 days to two weeks or the elimination of two days of leave for stewards to attend trainings/meetings). I also credit O'Leary's testimony that

the Union, at all times, refused to accept a partial agreement with additional provisions to be negotiated at a later date. Thus, the Respondents did not establish that the October 22 MOA accurately reflected an agreement between the parties.

Indeed, the Respondents failed to establish that Abondolo accepted any contract proposal during his side-discussion with Catalano. Catalano did not recall Abondolo's exact words, and the exact words are important. Over the course of his testimony, Catalano described the side-discussion in different ways, attributing to Abondolo such statements as "we agree, but I want to talk to you about the $800 and the $400"; "we have an agreement"; "we'll agree to what you want"; "we're good to go"; "I want to raise one thing with you"; ""we're done"; "we have a deal"; "we're good"; "we agree to what you're asking for"; "we agree to what you are proposing"; and "I agree to your proposal." Catalano's testimony in this regard does not make clear whether Abondolo was referring to a contract proposal or to the Respondents' concept of a buyout provision with a modification to the amount of money an employee would receive if he/she were bought out. It is undisputed that Catalano and Abondolo only discussed the buyout provision and no other provisions during their brief side-discussion. Neither Catalano nor Abondolo took notes and they did not exchange or refer to any contract proposals. When Catalano and Abondolo returned to the larger group, Catalano did not indicate that the parties had reached an overall contract. He merely referenced Abondolo's modified proposal on the buyout provision and indicated that he would attempt to draft an MOA in lieu of an additional bargaining session. Even if I were only to consider the testimony of Catalano, I would not conclude that Abondolo clearly communicated anything more than the Union's willingness to accept the Respondents' concept of discretionary layoffs (as opposed to an acceptance of the Respondents' entire contract proposal) in exchange for an increase in the amount of payment (i.e., $800 per year of service without a cap in the years). Moreover, Abondolo adamantly and credibly denied that he agreed to the Respondents' contract proposal, including a provision which would allow the Respondents not to hire some A&P employees and the use of AAA for arbitration.[32]

The interaction between the parties when Catalano and Abondolo returned from their side-discussion suggests they believed they had reached agreement on a buyout provision and were hopeful that this breakthrough on what had been a prominent dispute between the parties would allow them to conclude negotiations. However, the parties did not indicate a mutual understanding that all the terms had been agreed upon or that reduction of the contract to writing was simply a ministerial formality. After speaking to Abondolo separately, Catalano came back to the larger group and indicated that Abondolo "suggested off the record a different model" for computing the buyout. As reflected in Union notes, Catalano said, "tomorrow rather than meet I will prepare something send it to you with these kinds of concepts," and Abondolo said "we will work through the language." As noted above, Catalano did not say he and Abondolo discussed or agreed upon a full contract of all outstanding provisions. Sam Abed testified that Abondolo told him "everything was going to be worked out" and Diaz testified that Abondolo told him "I think we have a deal." These are not statements indicating certainty about the current existence of an agreement. Although I do credit the testimony of Respondent's witnesses that Abondolo shook their hands, I also credit the testimony of O'Leary and Booras that there was not a prominent or ceremonial shaking of hands among all the participants such as to suggest a mutual understanding that negotiations had been concluded.

The parties' subsequent exchange of written proposals conclusively demonstrated that they were not in agreement. The Union's November 2 response to the Respondents October 22 MOA demanded, among other things, that all A&P employees be hired except seafood department employees if the store was closing the seafood department (as the Respondents' offered on October 21), at least two department heads, and a complete agreement that used provisions of the Key Food industry agreement unless otherwise addressed in a memorandum of understanding executed by the parties. The Union's positions in these respects were consistent with the positions it took throughout negotiations.

It is important to consider the side-discussion in the context of negotiations as a whole and the ambiguity of evidence in support of the existence of a contract versus the clarity of evidence to the contrary. While a collective bargaining agreement can be concluded verbally, the technical rules of contract--offer and acceptance--need not be applied in a formalistic way in the context of collective-bargaining. The parties held 14 bargaining sessions over about four months, exchanging written proposals and keeping notes in the process. As of October 21, the status of negotiations and the positions of the parties were, at best, ambiguous. On October 19, the parties reviewed the September 22 proposal and Key Food industry agreement but did not agree to what

extent those documents should be used and incorporated into a contract. Abondolo and Catalano did not have or make reference to the September 22 proposal or Key Food industry agreement during their side-discussion. Ultimately, thereafter, the written exchange between the parties made clear that they were not in agreement. In this context, it hardly seems proper that a lengthy well-documented bargaining process resulting in the alleged existence of a multi-year agreement that purports to cover hundreds of employees and waive the rights of those employees to bargain over a subject as important as layoffs should be determined by seizing upon a brief ambiguous "off the record" discussion (so described by Catalano) as opposed to the clear and unambiguous writings of the parties.

The Respondents contend that, even if the parties did not reach agreement on October 21, they reached agreement on November 24. I do not agree. The Union emailed the Respondent a proposal on November 24 and it contains language that, according to the Respondents, adopted its buyout provision. However, by November 24, there were several open items other than buyouts. On November 25, Konzelman sent the Union an email that responded to each provision of the Union's November 24 offer and listed several items that were still in dispute. The disputed items included differences in the health and welfare plan, contributions to funds, use of AAA for arbitration, the number of department heads, the number and hours of part-time cutters, and the inclusion of provisions from the Key Food industry agreement. There being a number of open disputed items, a contract was not yet complete and the Respondents were not entitled to implement individual provisions, including a buyout provision that would have allowed for unilateral discretionary layoffs.

Unilateral Implementation of the MOA in the Absence of a Collective-Bargaining Agreement

Regardless of the existence of a contract, the Respondents contend that they were entitled to implement the MOA, including the buyout provision, as the initial terms of employment for newly hired A&P employees. In this regard, the Respondents claim they were not "perfectly clear" successors under *NLRB v. Burns Intern. Security Services*, 406 U.S. 272 (1972). The Respondents also contend that the APA, as approved by the order of Judge Drain in bankruptcy court, entitled them to implement their "last best offer." As discussed below, I do not agree.

Perfectly Clear Succession

A successor employer has a duty to recognize and bargain with an incumbent union where there exists a continuity of the enterprise and a continuity of the work force. With regard to the second element, continuity of the work force, the Union will be presumed to have majority support once the successor hires a ""substantial and representative complement" or "full complement" of unit employees and a majority of those unit employees were employees of the predecessor. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972); *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Here, the Respondents admit they did not significantly change the nature of the enterprise and that a majority of the employees they hired were former unit employees of A&P. Accordingly, the Respondents were successors of A&P.[33]

Ordinarily, a successor may set the initial terms of employment of unit employees and bargain from that baseline once successorship status is established. *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972). However, this is not the case when succession is "perfectly clear." In *Burns*, 406 U.S. at 294-295, the Supreme Court stated:
Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms. In other situations, however, it may not be clear until the successor employer has hired his full complement of employees that he has a duty to bargain with a union, since it will not be evident until then that the bargaining representative represents a majority of the employees in the unit as required by s 9(a) of the Act, 29 U.S.C § 159(a).

Despite the Supreme Court's reference to a successor's intent to hire "all of the employees in the unit," the Board's interpretation of *Burns* "does not require that all employees had to be hired." Rather, enough employees must be hired to make it evident that

the Union's majority support will continue. *Fremont Ford*, 289 NLRB 1290, 1296 (1988), citing *Spitzer Akron, Inc.*, 219 NLRB 20, 22 (1975), enfd. 540 F.2d 841 (6th Cir. 1976) cert. denied 429 U.S. 1040 (1977). Further, the successor's obligation to bargain commences when the successor makes it "perfectly clear" that it planned to retain all or substantially all of the predecessor's employees. *C.M.E., Inc.*, 225 NLRB 514, 514-515 (1976). In "perfectly clear" successor cases, communications with the employees' union are regarded "as communications with the employees through their representative." *Marriott Management Services,* 318 NLRB 144 (1995). See also *Elf Atochem North America, Inc.*, 339 NLRB 796, 796 (2003); *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994). A successor can communicate its clear intent to hire the predecessor's employees and trigger the obligation to bargain before the successor actually hires employees. See *Creative Vision Resources, LLC*, 364 NLRB No. 91 (2016); *Elf Atochem North America, Inc.*, 339 NLRB 796, 796 (2003); *DuPont Dow*, 332 NLRB 1071, 1075 (2000); *Helnick Corp,* 301 NLRB 128, fn. 1 (1991); *Spitzer Akron,* 219 NLRB 20, 23 (1975).

Succession is not "perfectly clear" where a purchaser announces a clear intent to set its own initial terms and, therefore, the duty to bargain with an incumbent union will turn on whether a majority of the predecessor's employees accept employment under those terms. In such circumstances, the potential successor may unilaterally establish the initial terms of employment in accordance with its stated intent. *Spruce Up Corp.*, 209 NLRB 194, 195 (1974).

Here, there is little question that the Respondent purchasers of A&P stores were "perfectly clear" successors before the APA was amended on September 30. The original APA, signed July 19, required purchasers to offer employment to all employees under the terms of the applicable A&P collective-bargaining agreements unless modified agreements could be negotiated with the incumbent unions. Thus, "it was abundantly clear from the outset that the Respondent planned to retain the unit employees." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip. op. at 7 (2016) (in purchase agreement, perfectly clear successor committed to offering employment to all of the predecessor's employees). Further, the only way the Respondents could avoid offering employment to employees upon the existing terms (i.e., the A&P contracts) was to reach a modified agreement with the union representative of those employees. Thus, consistent with the situation anticipated in *Burns*, it was "perfectly clear that the Respondent plan[ned] to retain all of the employees in the unit" and "initially consult with the employees' bargaining representative before' modifying terms." *Burns*, 406 U.S. at 294-295.

The Respondents nevertheless contend that their status as "perfectly clear" successors changed when Section 6.4 of the APA was amended since the amended APA only required a purchaser to offer employment to "substantially all" employees on terms that, absent an agreement to the contrary, were reflected in the purchasers' "last best offer." "However, where the offer of different terms was subsequent to the expression of intent to retain the predecessor's employees, the Board has regarded the expression of intent as controlling and has found that the new employer was obligated to bargain with the union before fixing initial terms." *Spitzer Akron, Inc.*, 219 NLRB 20 (1975), enfd. 540 F.2d 841 (C.A. 6, 1976). See also *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip. op. at 7 (2016); *Canteen Co.*, 317 NLRB 1052, 1053-1054 (1995); *Fremont Ford*, 289 NLRB 1290, 1296-1297 (1988); *Starco Farmers Mkt.,* 237 NLRB 373 (1978); *Ivo H. Denham and Geraldine A. Denham*, 218 NLRB 30 (1975); *Bachrodt Chevrolet Co.*, 205 NLRB 784 (1973), enfd. 515 F.2d 512 (7th Cir., 1975), cert denied 423 U.S. 927 (1975). In particular, the Board has held that an employer cannot set initial terms where "employees were lulled into believing that employment conditions would be comparable to those in force under the predecessor and were thus deprived of the opportunity to reshape their personal affairs or seek employment elsewhere." *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip. op. at 9 (2016).

Between July 27 and October 21 (when Judge Drain approved the APA as amended on September 30), the employees worked for the predecessor with the understanding that they would be retained by the Respondents under their old terms of employment unless their bargaining representative agreed to something different.[34] As admitted by the Respondents in its brief, the incumbent unions effectively had veto power over any change in terms and conditions of employment before the amended APA was approved. The employees had no way of knowing that, at the eleventh hour in negotiations, the rules would suddenly change and they would be subject to the unilateral imposition of a proposal that provided for their unilateral layoff at the discretion of the Respondents without the Union's consent. Therefore, employees could not make arrangements in advance to "reshape their personal affairs and seek employment elsewhere." Id. Such a result is not consistent with the dictates of *Spruce Up.*

Further, even after the APA was amended, it was still perfectly clear that the Respondents were going to hire a majority of employees and retain the obligation to bargain with the Union. Section 6.4, as amended, still required the purchaser to offer employment to "substantially all" employees. See *C.M.E., Inc.*, 225 NLRB 514, 514-515 (1976) ("substantially all" employees interpreted by the Board as a majority of the full complement). The September 30 amendment also failed to modify Section 6.3, which continued to require a purchaser to assume the old A&P agreement or negotiate a modified agreement with the Union. This necessarily presumes and it was "perfectly clear" that the Union would have majority support and represent the successors' employees. *Nexeo Solutions, LLC*, 364 NLRB No. 44, slip. op. at 9 (July 18, 2016) ("Imposing an initial bargaining obligation in these circumstances, where the Union's majority status in the new work force is essentially guaranteed, implements the express mandates of Section 8(a)(5) and 9(a) of the Act and is entirely consistent with the rationale of *Burns* and *Spruce up*").

The Respondents mistake the rational of *Burns* and *Spruce Up* in contending that they were entitled to unilaterally implement initial terms because they announced at the start of bargaining a desire to modify the A&P contracts and engaged in negotiations to do so. Those cases establish that, when succession is not in doubt, the law requires successors to engage in such negotiations and refrain from setting initial terms without reaching a good-faith impasse.[35]

Finally, I reject the Respondent's reliance on *Nexeo* for the proposition that the APA did not trigger succession because employees were not notified of it. In *Nexeo*, employees of a predecessor were notified that a purchaser entered into a purchase agreement to retain all employees at the same wage levels and substantially comparable levels of benefits. The Board determined that the purchaser was a "perfectly clear" successor as of the date employees received notice of this agreement (i.e., two days of after it was signed). Here, the APA was filed in bankruptcy court on July 20 with a motion for approval of the sale of stores by A&P to Respondent Key Food. The Union participated in the bankruptcy process and was placed on notice of the contents of the APA. Indeed, Judge Drain's order specifically speaks to the adequacy of notice of the sale that was provided to interested parties, including affected unions. And as noted above, in "perfectly clear" successor cases, communications with the employees' union are regarded "as communications with the employees through their representative." *Marriott Management Services,* 318 NLRB 144 (1995). Accordingly, I conclude that employees through the Union received notice of the APA on July 20 and that the Respondents were "perfectly clear" successors as of that date.

Implementation of the Buyout Provision if Succession were not Perfectly Clear

Even if I were not to find the Respondents to be "perfectly clear" successors, I would rule that the Respondents unlawfully implemented its buyout proposal as a basis for unilaterally laying off unit employees. In this regard, I find the rules regarding implementation upon impasse to be instructive. As a general rule, an employer may implement its last best offer in negotiations as a device to exert pressure on a union to break a temporary good-faith impasse in negotiations. *McLatchy Newspapers Inc.*, 321 NLRB 1386, 1388 (1996) (*McLatchy II*) However, the parties "remain obligated to continue their bargaining relationship and attempt to negotiate an agreement" without using implementation-upon-impasse as "a device to allow any party to continue to act unilaterally or to engaging in the disparagement of the bargaining process." Id. at 1390. In *McLatchy II*, a case in which the employer implemented merit pay increases upon impasse, the Board stated as follows:
Specifically, were we to allow the Respondent to implement without agreement these proposals, such that the Employer could thereafter unilaterally exert unlimited managerial discretion over future pay increases, i.e., without explicit standards or criteria, the fundamental concern is whether such application of economic force could reasonably be viewed "as a device to [destroy], rather than [further], the bargaining process." As explained below, we find that if the Respondent was granted carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining.

Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgeably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated,

given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion. The Respondent's ongoing ability to exercise its economic force in setting wage increases and the Guild's ongoing exclusion from negotiating them would not only directly impact on a key term and condition of employment and a primary basis for negotiations, but it would simultaneously disparage the Guild by showing, despite its resistance to this proposal, its incapacity to act as the employees' representative in setting terms and conditions of employment.

Nothing in our decision precludes an employer from attempting to negotiate to agreement on retaining discretion over wage increases. And, absent success in achieving such an agreement, nothing in our decision precludes an employer from making merit wage determinations if definable objective procedures and criteria have been negotiated to agreement or to impasse.

An employer's decision whether to reduce its workforce and who to layoff are key terms and conditions of employment. For the laid off employees, severance of the employment relationship terminates all other terms and conditions of employment. Further, although *McLatchy II* established an exception to the implementation-upon-impasse rule, the rational is applicable to the instant successor situation. As discussed above, the *Burns* and *Spruce Up* line of cases ordinarily allow a potential successor to set initial terms in advance of bargaining in order to determine how many of the predecessor's employees will accept those terms and whether the incumbent union will retain majority support once a full complement of employees are hired. However, the bargaining process would be fundamentally undermined if initial terms set unilaterally by the potential successor during a brief period when successorship was in doubt had the effect of excluding the incumbent union from bargaining over key discretionary mandatory decisions after successorship was confirmed and a bargaining obligation attached. This is the result the Board sought to avoid in *McLatchy II.*

The unilateral implementation of a discretionary buyout provision would not create a fixed, objective status quo as a predictable baseline for bargaining over future decisions. The Union would be unable to explain to employees when a reduction in force would occur, how many employees would be laid off, and who would be selected for layoff. The MOA does not, for example, indicate that the Respondents' right to lay off a specific number of employees would be triggered in a department once payroll exceeded a certain percentage of the department's revenues or that the selection of employees for layoff would be based on A&P seniority or some other objective criteria. Rather, the MOA renders to the Respondents at their sole discretion the right to unilaterally lay off any employee under any economic circumstances in unlimited number for the year following the hire of A&P employees. I cannot recommend such a result to the Board, given the reasoning of *McLatchy II*, even though that case arose in the context of impasse and this case arises in the context of successorship.

The Bankruptcy Order of Judge Drain

The bankruptcy order of Judge Drain does not alter, here, the prohibition against unilaterally laying off employees.

Federal labor law and the bankruptcy order approving the APA should be interpreted to the extent possible in a manner that is consistent and does not unnecessarily negate the statutory rights of employees under the Act. On October 21, when the amended APA was approved by Judge Drain, the parties were engaged in bargaining. The APA as amended does nothing more than reflect the reality that good-faith bargaining sometimes results in impasse rather than agreement. The amended APA, in Section 6.4, speaks of “good-faith negotiations” and the offer of employment upon a “last best offer.” These are common terms with legal consequence in labor law. “Good-faith negotiations” require an employer to refrain from unilaterally implementing a “last best offer” until the parties reach a good-faith impasse. The phrase “last best offer” or “last, best and final offer” signals impasse in that the employer is effectively saying, “this is the best we can do, we will not offer anything better at this time, so if you do not accept our last best offer the parties are at impasse.” See e.g., *GATX Logistics, Inc.*, 325 NLRB 413 (1998). Thus, under

the approved APA, the Respondents would be entitled to implement their last best offer upon reaching a good-faith impasse in negotiations for a modified agreement, but not before. If the parties to the sale or the bankruptcy court wanted to negate the requirement that a last best offer only be implemented upon good-faith impasse, they should have used terminology that does not logically incorporate such a requirement. Here, since the Respondents have not contended that the parties reached impasse, the Respondents were not entitled to implement their last best offer, including the buyout provision.

The procedure and timing of the sale, as described in the APA, does not require a finding that the bankruptcy court contemplated the unilateral implementation of a last best offer prior to impasse. Section 6.4(a) of the APA states that, "at least (10) days prior to the Closing Date, Buyer shall make an offer of employment to substantially all Covered Employees who are represented by an Affected Union...." and the offer of employment will be based on the Buyer's last best offer if no Affected Labor Agreements or Modified Labor Agreements are in effect. The "Closing Date" is defined in Section 2.4 of the APA as "the third (3rd) Business Day following the date upon which all of the conditions to the obligations of Sellers and Buyers to consummate the transaction contemplated hereby set forth in Article VII... have been satisfied or waived or on such other date as shall be mutually agreed upon by the Sellers and Buyer prior thereto." Article 7 of the APA provides as a condition of closing that the buyer and seller perform and comply with their covenants and agreements under the APA, including the covenant in Section 6.3 that the buyer "engage in good faith negotiations, in coordination with Sellers, toward reaching mutually satisfactory modifications to the relevant Affected Labor Agreement with each of the Affected Unions...." Thus, the APA effectively makes the successful negotiation of a modified agreement or good-faith impasse a covenant and condition that must be satisfied prior to the closing date and any offers of employment.

The bankruptcy order should also be read in a manner that is consistent with *McLatchy II* (discussed above). Even if the parties did reach impasse, the Respondents would not be entitled to utilize the temporary cessation of negotiations as a vehicle to avoid bargaining over future discretionary changes. Indeed, the bankruptcy order would not logically provide for implementation of the buyout provision even if the order were not read to require impasse as a condition of implementing its last best offer. At most, the APA contemplated a singular event and temporary condition whereby the Respondents would be entitled to open stores on the basis of changed terms. The amended APA does not indicate that such a singular suspension of the rules against unilateral implementation, upon impasse or otherwise, could be used as a device for a purchaser to take discretionary unilateral action on mandatory subjects of bargaining in the future after the stores opened and the Respondents' bargaining obligations resumed.

Bargaining over Layoffs

Irrespective of the buyout proposal in the MOA, the Respondents contend that they satisfied their bargaining obligation. I disagree.

On October 14, the owners of each Respondent identified how many unit employees they intended to keep and how many they did not want to hire. Some of the Respondents identified the specific employees by position (not name) they wanted to retain from A&P. However, the next day, when O'Leary attempted to confirm the positions of employees the stores intended to fill with former A&P employees, Konzelman refused to provide that information. Further, the Respondents did, in fact, hire all of the employees who were subsequently laid off despite any earlier indications to the contrary on October 14. Thus, the Union had no reason to believe the jobs of those employees were in immediate jeopardy. Once the Respondents hired employees, the Respondents were required to notify and offer to bargain with the Union over any subsequent layoffs.

Conclusion with Regard to Unilateral Layoffs

Based on the foregoing, I find that the following Respondents violated Section 8(a)(5) and (1) of the Act by laying off the employees listed below:[36]

Venus Nepay	HB	November 10

Richard Maffia	HB	November 11
Khadisha Diaz	HB	November 12
Joseph Battista	Albany Avenue	November 28
Kalvin Harris	Albany Avenue	November 28
Gina Cammarano	Greaves Lane	November 28
Debra Abruzzese	Greaves Lane	November 28
Michael Fischetti	Greaves Lane	November 30
Anthony Venditti	Greaves Lane	November 30
Ayanna Jordan	Seven Seas	December 26
Mariano Rosado	CS2	January 4, 2016
Stephen Fiore	Albany Avenue	January 30, 2016
Robert Jenzen	Albany Avenue	January 30, 2016

Unilateral Changes other than Layoffs

In addition to unilateral layoffs, the complaint alleges that employees had their pay unilaterally reduced when (1) Respondent Greaves Lane changed the schedules of all unit employees from six to five days, (2) Respondent Albany Avenue reduced the work hours of Steven Jenzen and Stephen Fiore, and (3) Respondent Albany Avenue demoted Stephen Fiore and reduced his hourly wage rate.

Respondents Greaves Lane and Albany Avenue do not deny that these changes were implemented without notifying the Union and offering the Union an opportunity to bargain over them. Shortly after Thanksgiving, Respondent Greaves Lane reduced employees' days of work from 6 to 5. In about late-December (after Christmas), Respondent Albany Avenue offered Jenzen the option of not working Sundays or changing his hours from 40 to 35 hours per week. Jenzen opted not to work Sundays. Nevertheless, about 2 weeks later, Jenzen's weekly hours were reduced to 35 as well. On about January 16, 2016, Respondent Albany Avenue demoted Fiore from meat manager to butcher, reduced his wage rate from $31.33 to $25 per hour, and reduced his weekly hours from 40 to 35.

A reduction in the wages and hours of all or individual unit employees is a mandatory subject of bargaining. *Carpenters Local 1031*, 321 NLRB 30 (1996) (overruling cases holding that changes to the terms of employment of only one employee are not mandatory decisions and finding that changing hours is a violation of the Act); *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 418-419 (2006) (unilateral reduction of employee's wage from $12.35/hour to $11.15/hour violated Section 8(a)(5) and (1) of the Act); *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993) (elimination of shift that effected two employees was a mandatory subject of bargaining); *Kentucky Fried Chicken*, 341 NLRB 69 (2004) (job assignment change from one unit employee to another that reduced overtime work was a mandatory subject of bargaining).

Respondents Greaves Lane and Albany Avenue contend only that financial data they obtained before the purchase misrepresented the revenue of the A&P stores and made it necessary to reduce payroll in order to improve the store's long-term financial viability. Thus, citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (197), the Respondents contend that changes in the reduction of hours and "the volume of business to be performed strike at the core of entrepreneurial contract and do not

require decisional bargaining." However, *Ford Motor Co.* dealt with in-plant food prices an employer charged employees and the Board's decision held that such prices are "not among those 'managerial decisions, which lie at the core of the entrepreneurial control."' Id. quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964). Thus, *Ford Motor* Co. is not factually parallel and in no way suggests that a change in pay is a core managerial decision within the entrepreneurial control of an employer. In fact, the Board and courts have long recognized that "wages and hours are the heart and core of the employer-employee relationship...." *Southern States Equipment Corp.*, 124 NLRB 833, 839 (1959) quoting *International Woodworkers of America, Local Unions 6-7 & 6-122, AFL-CIO v. NLRB.,* 263 F.2d 483 (D.C. Cir. 1959).

The Respondents did not assert that changes to employee pay were caused by the type of "compelling economic considerations that the Board has long recognized as excusing bargaining entirely...." *RBE Electronics*, 320 NLRB 80, 82 (1995); *Bottom Line Enterprises,* 302 NLRB 373 (1991); *Eugene Iovine, Inc.*, 353 NLRB. 400 (2008). The Board imposes a "heavy burden" of establishing that "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *RBE* Electronics, 320 NLRB at 81. Thus, "absent a dire financial emergency, the Board has held that economic events such as a loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." Id. Here, the Respondents' sales were lower than expected when they assumed their respective operations. However, the Respondents did not provide evidence at trial regarding their overall financial conditions or to what extent these shortfalls in anticipated sales could be tolerated and for how long. Accordingly, the Respondents did not establish that their circumstances were dire or threatened the solvency of their businesses without immediate unilateral action.

Respondent CS2 Direct Dealing with Employees by Offering Mariano Rosado a Severance Agreement

The General Counsel contends that Respondent CS2 dealt directly with employee Mariano Rosado by asking him to sign a severance agreement without notifying the Union and offering to bargain over it. It is uncontested that Respondent CS2 did, in fact, request that Rosado sign a severance agreement without advising the Union in advance or giving the Union a copy of the proposed severance agreement. Thereafter, the Union objected to the conduct of Respondent CS2 in this regard. Accordingly, Respondent CS2 violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees. *Hotel Bel-Air*, 361 NLRB 898 (2014).

Refusal by all the Respondents to Resume Bargaining in July 2016

In late-June 2016, the Union contacted the Respondents to establish bargaining dates. The Respondents did not then and do not now contend that the parties were at impasse. Rather, the Respondents have taken the position that additional bargaining was unnecessary because the parties had reached a collective-bargaining agreement. However, as detailed above, I have found that the parties did not reach an agreement. Accordingly, the Respondents retained an obligation to meet and bargain with the Union to the conclusion of a contract or good-faith impasse. I note also that the October 22 MOA provided that a "union security clause, recognition clause, no lie detector clause, management rights clause, no discrimination clause, bulletin board clause, and no employment of minors clause" would be included in the contract and these provisions still needed to be negotiated. Accordingly, even if the MOA did reflect an agreement between the parties, such an agreement contemplated additional negotiations. The Respondents refused to engage in such negotiations.

As a defense to the refusal to bargain allegation, the Respondents contend that the Union abandoned the units in early-December. An incumbent union's disclaimer of its desire to represent the bargaining unit must be "unequivocal" and consistent with "surrounding circumstances." *Hartz Mountain Corp.,* 260 NLRB 323, 325 (1982) quoting *Retail Associates, Inc.*, 120 NLRB 388, 391 (1958). The Union did not expressly or impliedly, and certainly did not unequivocally, abandon and disclaim interest in representing the units. Indeed, the Union expressly requested bargaining dates, which the Respondent rejected. At the bargaining table, the Union objected once the Respondents began laying off employees. The Union attempted to arrange for the placement of Quiles and Maffia at the Respondents' stores and advised the Respondents that Board charges would be filed to contest alleged unlawful layoffs. The Union also engaged in handbilling at the stores to protest layoffs and other changes in terms and conditions of employment. The Union filed the instant unfair labor practice charges to contest the Respondents conduct,

including allegations that the Respondents were refusing to bargain in good-faith. Accordingly, I find that the Union did not abandon the bargaining units and the Respondents retained an obligation to bargain with the Union. The Respondents failed to do so in violation of Section 8(a)(5) and (1) of the Act.

ii. section 8(a)(3) and (1) allegations and independent 8(a)(1) allegations

Respondent HB Nelson Quiles--Interrogation, Layoff and Refusal to Hire

The Board has held companies liable for violating the act when they coercively act upon the employee of a different company. *A. M. Steigerwald Co.,* 236 NLRB 1512, 1515 (1978) ("the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship"). On September 5, Quiles participated in a union demonstration of the Cross Bay store, which is owned by Frank Almonte. A video recording showed Frank in a position to see Quiles at the union demonstration talking to a union representative. The next day, September 6, Frank came to the store and repeatedly asked Quiles in an accusatory manner whether it was a nice thing for him to do the previous day and who in the Union sent him to the demonstration.

The General Counsel contends that Frank Almonte's questioning of Quiles on September 6 constituted unlawful interrogation, and I agree.[37] The manner, phrasing and repetition of the questioning--"do you think it was right?"--conveyed the implication that Frank Almonte did not think it was right for Quiles to be participating in the union job action. In fact, Quiles indicated that he felt threatened by the questioning. It is true that Respondent HB was not Quiles' employer at the time and the record is not entirely clear whether Quiles knew the Almontes would be purchasing the Howard Beach store. However, Quiles did indicate that it was all over the news through September and October that Waldbaums was being purchased by Key Food, and Frank Almonte introduced himself to Quiles on September 6 as an owner of Key Food. Further, Quiles was laid off after the Almontes, on the same day, spoke to Britt. Under the circumstances, a reasonable employee would interpret the questioning by Frank Almonte on September 6 as a precursor to his layoff. Taken in context, the questioning by Frank Almonte was coercive and would tend to have a suppressing effect on employees' union activities.

The complaint further alleges that Respondent HB caused A&P to layoff Quiles and then refused to hire him. A company may be "found to have violated 8(a)(3) with respect to employees not its own, when it urged or caused employer B to discharge specific individuals who were engaged in union activity." *Airborne Freight Co.*, 338 NLRB 597, 604 (2002) citing *Holly Manor Nursing Home*, 235 NLRB 426, 428 fn. 4 (1978), *Central Transport, Inc.*, 244 NLRB 656, 658-659 (1979), and *Georgia-Pacific Corp.*, 221 NLRB 982, 986 (1975). Although the Almontes did not formally assume the Howard Beach operation until October 26, the evidence shows that they caused A&P to lay off Quiles on October 23. Frank Almonte's interrogation of Quiles' is strong evidence that Respondent HB was hostile toward him because of his union activity. The parties' discussions at the bargaining table tend to confirm that Respondent HB was hostile toward employees, particularly Quiles, who participated in the Union job actions. During a bargaining session on November 13, when O'Leary raised the issue of Maffia and Quiles, Catalano indicated that the Union was wrong to demonstrate at Cross Bay. Further, during a bargaining session on November 19, when Solicito raised the issue of reinstating Quiles, Catalano indicated that Respondent HB did not want to take employees back because the Union put up picket lines. These comments reflect Respondent HB's hostility toward Quiles and a desire not to employ him because he took part in a Union job action the company found to be offensive.

On October 23, the Almontes admittedly told Britt they preferred Maffia instead of Quiles as the meat manager. Later that day, Britt told Quiles he was being laid off. Although Gilbert Almonte denied telling Britt to lay Quiles off, Frank Almonte was not called by the Respondents to corroborate this claim. Likewise, the Respondents did not call Britt to deny he was directed to lay Quiles off or to explain why he would lay off a longstanding employee on his own initiative two days before the store transitioned to Key Food.

Under the circumstances, given the totality of the evidence, I find that Respondent HB directed Britt to lay off Quiles as a way to avoid hiring him on this basis of his union activity.[38]

I also find that Respondent HB refused to hire Quiles because of his union activity. In support of a discriminatory refusal to hire allegation, the General Counsel may satisfy its initial burden by showing that the Respondent was hiring, the applicant had relevant experience for the position, and antiunion animus contributed to the decision not to hire the applicant. Upon such a showing by the General Counsel, the burden shifts to the employer to show it would not have hired the applicant even in the absence of his union activity. *FES*, 331 NLRB 9 (2000) (allocating the *Wright Line* burdens in a refusal-to-hire case).

Here, the Almontes admit they intended to hire a meat manager when they took over the operation on October 26. Quiles had experience in the position and Gilbert Almonte did not testify that Quiles was unqualified for the job. Gilbert merely testified that they preferred Maffia over Quiles as a meat manager. Further, Gilbert offered no credible or logical explanation for refusing to hire Quiles. Although the Almontes may have preferred Maffia over Quiles as meat manager, they were told by Britt and the Union that Maffia was not available because he worked at a different store. Gilbert's testimony that they did not hire Quiles because Quiles had been laid off before the opening is not credible or compelling since, as noted above, the evidence strongly suggests that the Almontes directed Britt to lay Quiles off in the first place. The pretextual nature of Respondent HB's ostensible reasons for not hiring Quiles adds considerably to other evidence (described above) that Respondent HB sought to avoid employing him because of his union activity. In sum, the General Counsel presented sufficient evidence that Quiles' union activity contributed to Respondent HB's decision not to hire him, and Respondent HB failed to prove it would not have hired Quiles regardless of that activity.

Richard Maffia--Layoff

I have already found that the Respondent violated Section 8(a)(5) and (1) by unilaterally laying off Maffia on November 11. In so holding, I refused to credit Gilbert Almonte's testimony that Maffia arrived for work his first day but left at the Union's direction without beginning his employment. Rather, I credited the testimony of Maffia in finding that he worked a full day on November 9, was absent on November 10, and was laid off on November 11. However, I reject the General Counsel's theory in support of a Section 8(a)(3) and (1) violation that Respondent HB laid off Maffia as part of an effort to avoid paying certain former A&P employees high Union wages. See *Hagar Management corp.*, 313 NLRB 438, 442 (1993); *Sierra Realty Corp.*, 317 NLRB 832, 833 (1995) enf. denied 82 F.3d 494 (DC Cir. 1996); *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980)

In *Sierra Realty Corp.*, 317 NLRB 832, 833 (1995), a refusal to hire case, the Board determined that "refusing to hire employees in order to avoid their union wage scale is the plainest form of 8(a)(3) discrimination and is in no way lawfully distinguishable from a refusal to hire employees in order to avoid a successorship obligation." The Board went on to say that, "[c]ollectively, such conduct constitutes discrimination against employees' 'union affiliation'....'D' Id. The Board in *Sierra Realty Corp.* sought to distinguish *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980), which stands for the proposition that an employer may, for valid economic reasons, refuse to hire employees who evince through their union a desire to retain the wages they possessed in a contract with a predecessor employer. In *Sierra Realty*, the Board held that "*Vantage Petroleum Corp*. . . is inapposite" where there is no evidence that employees "would have declined an offer of employment . . . at the Respondent's lower wage rates." 317 NLRB at 834-835.[39] In such a circumstance, the employer may be found to have refused to hire employees simply because they were covered by the wage scale in a union contract (perhaps mistakenly assuming that employees would not accept lesser wage rates) and not because the wage demands of employees were being rejected for valid economic reasons (i.e., the new employer could hire other employees at a lower rate).[40]

These cases demonstrate that an employer may not select employees for hire or lay them off simply because they are paid pursuant to a collective-bargaining agreement. However, an employer is not forbidden, absent some contractual restriction, from selecting employees for hire or layoff on the basis of their respective wage rates once their bargaining representative declines to modify its wage demands.[41] *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980). In such a circumstance, the employer is not making a decision based on union affiliation, but an economic decision based on cost. Here, the Union was quite clear from the start of bargaining that former A&P employees would not accept wage cuts. The parties bargained over the issue at length and the Respondents ultimately agreed to pay former A&P employees the wages they received under the old A&P contracts.

Although the parties did not reach agreement on a contract as a whole, the Respondents (including HB) largely hired former A&P employees at their existing wage rates. Accordingly, Respondent HB was not forbidden from making layoff decisions based on the relative contractual wages of unit employees.

Regardless, the record did not establish that Maffia was laid off because of his contractual wage rate. Respondent HB specifically requested Maffia, who had been working as a meat manager at union scale in the Waldbaums on New Utrecht Avenue. Catalano arranged with O'Leary for Maffia to be transferred to Howard Beach at his contractual hourly rate. Respondent HB hired Maffia and he worked for one day at that pay rate without incident. Respondent HB did hire new butchers Castillo and Monegro and the record contains some evidence that these butchers were initially paid cash under the table at a much lower non-contractual rate of $9 per hour. However, Castillo and Monegro were hired when the store opened, on October 26, before Maffia was hired on November 9.[42] Thus, the hiring of Castillo and Monegro did not hinder Respondent HB from hiring Maffia and the evidence does not indicate that Respondent HB suddenly decided, two days later, that Maffia was making too much money.[43] Further, the evidence did not establish that Maffia was replaced by employees who were not paid at union scale. Accordingly, the General Counsel did not establish that Maffia was laid off because he was earning a contractual wage or that his layoff was otherwise based upon his union affiliation.

Venus Nepay--Layoff

I have already found, above, that the Respondent violated Section 8(a)(5) and (1) by laying off Venus Nepay on November 10. However, I reject the General Counsel's contention that Nepay was laid off in violation of Section 8(a)(3) and (1).

The General Counsel asserts that Respondent HB laid off Nepay to avoid paying her union wages. Indeed, Gilbert Almonte testified that one of the reasons he laid off Nepay was because her "salary was very high." However, for reasons previously stated, I do not believe it would have been unlawful for Respondent HB to select employees for layoff based upon their respective contractual wage rates. *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980); *Sierra Realty Corp. v. NLRB,* 82 F.3d 494 (DC Cir. 1996). Thus, for example, it would not have been unlawful for Respondent HB, in an effort to save money, to lay off Nepay instead of Khadisha Diaz because Nepay was a full-time meat wrapper earning a contractual rate of $25.50 per hour and Diaz was a part-time meat wrapper earning a contractual rate of $9.75 per hour. Their wage rates were determined by the same union contract and there is no basis for differentiating between them by union affiliation. Regardless, there is little evidence that Respondent HB preferred Diaz over Nepay on the basis of their respective wages since Diaz was laid off just 2 days after Nepay. Further, the General Counsel has not pointed to evidence that either Nepay or Diaz were replaced by meat wrappers who were paid less or were not paid union scale. Accordingly, the General Counsel did not establish that Nepay was laid off because of her union wage or affiliation.

Khadisha Diaz--Layoff

I have already found, above, that Respondent HB violated Section 8(a)(5) and (1) by laying off Khadisha Diaz on November 12. However, I reject the allegation that Diaz was laid off in violation of Section 8(a)(3) and (1).

Diaz testified that her mother was a Union representative who came to the store and worked with Britt in that capacity. The record does not indicate when Diaz's mother came to the store or how often and does not indicate that her relationship with Britt was poor. The record is also lacking in evidence that Britt or A&P maintained any antiunion animus. Although the record contains evidence that the Almontes were hostile toward employees for engaging in a job action at Cross Bay and a suspected subsequent work stoppage, the record does not show that the Almontes were broadly hostile toward employees who did not participate in union activities specifically directed at one of their stores. Respondent HB purchased a unionized A&P store and hired all the unit employees. Under the circumstances, I do not believe the General Counsel made out a prima facie case that Respondent HB laid off Diaz because her mother held a position with the Union.

The General Counsel asserts that Respondent HB laid off Diaz to avoid paying her a contractual wage, but this theory is unavailing for the reasons previously addressed above in the sections regarding Maffia and Nepay.

Respondents Greaves Lane and Albany Avenue

The General Counsel alleges that Respondent Greaves Lane laid off Anthony Venditti on November 30 and Respondent Albany Avenue laid off Stephen Fiore on January 30, 2016 because of their union activities. The complaint also alleges that Respondent Albany Avenue violated Section 8(a)(3) and (1) by demoting, reduced the wage rate, and reducing the work hours of Fiore shortly before he was laid off. I have already found, above, these adverse employment actions to be violation of Section 8(a)(5) and (1). As discussed below, I find the Section 8(a)(3) and (1) allegations to have merit as well.

Layoff of Anthony Venditti by Respondent Greaves Lane

The General Counsel made out a prima facie case that Respondent Greaves Lane laid off Venditti because of his union activity. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), "the General Counsel must prove that antiunion animus was a substantial or motivating factor in the employment action. If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of employee union activity." *Baptistas Bakery, Inc.*, 352 NLRB 547, 588, fn. 6 (2008).

Respondent Greaves Lane was aware of Venditti's union activities. The Greaves Lane supermarket transitioned to a Key Food on November 24. Venditti was the assistant Union steward. During the first week, after Respondent Greaves Lane reduced unit employees' weekly days of work from 6 to 5, Venditti asked the store manager whether any additional changes would be implemented. Venditti also questioned the store manager about the layoffs of Abruzzese and Cammaretti. On November 29, Venditti participated in Union handbilling at the Greaves Lane store. This was the first day the Union engaged in handbilling at either store owned by the Abeds. According to Venditti, the handbills contained an objection to changes in employees' terms and conditions of employment (the same concern that Venditti had inquired about). Monier testified that Randy Abed watched Venditti while he was outside handbilling and took pictures of the handbillers. The Respondents did not call Randy Abed as a witness to deny this testimony. Thus, the evidence established that Venditti was a union steward who was known by Respondent Greaves Lane to have engaged in Union activities, including handbilling.

The evidence also established that Venditti's layoff was, at least in part, based on substantial antiunion considerations. The timing strongly supports a finding of antiunion motivation as Venditti was laid off 2 days after he questioned the store manager about changes and one day after he participated in the Union's first day of handbilling at either Abed store. Further, Greaves Lane employees Coughlin and Conti testified that Sam Abed later threatened to discharge them if they went outside to join the Union. Respondent Greaves Lane, therefore, demonstrated an express hostility toward individuals who participated in handbilling and an intention to sever them on that basis.[44]

I also find it noteworthy and supportive of a prima facie case that Sam Abed referenced Abondolo and negotiations with the Union when Venditti was being laid off. Sam asked Venditti whether he had spoken to Abondolo and stated that they would only deal with Abondolo going forward. The fact that Respondent Greaves Lane raised the Union while Venditti was being laid off tends to suggest some connection between the two. Further, in his capacity as steward, Venditti had questioned the store manager about reductions in the schedule and the layoff of employees. Although the comment by Sam was somewhat ambiguous, it suggests hostility toward Venditti as someone who was attempting to address Union concerns with management instead of leaving those matters to Abondolo.[45]

After Respondent Greaves Lane laid off Venditti, a number of butchers were transferred to and hired by the store. Meanwhile, Respondent Greaves Lane did not attempt to recall Venditti even though the Respondents have taken the position that the MOA was in effect and the MOA provides recall rights within one year of a layoff.

Respondent Greaves Lane contends that the store was attempting to cut payroll and would have laid Venditti off, a highly paid butcher, regardless of his union activity. I reject this *Wright Line* defense. First, Greaves Lane asserts that meat department employees were laid off so the department's payroll would be approximately 10 percent of department sales, but did not attempt to establish, through appropriate records, that payroll was actually reduced in line with revenues. Second, Respondent Greaves Lane failed to credibly articulate a lawful reason for selecting Venditti for layoff. Randy Abed testified that Venditti was laid off because he had less seniority in the store than other employees, but butchers Conti and Young both had less seniority in the store than Venditti. Third, as noted above, Respondent Greaves Lane hired new butchers instead of recalling Venditti despite a provision for recall rights in the MOA. Accordingly, based on the foregoing, Respondent HB failed to establish a *Wright Line* defense that Venditti would have been laid off regardless of his union activities.

Respondent Greaves Lane nevertheless contends that Venditti's handbilling was not protected because the handbills asked customers not to shop at the store. However, it is well settled that employees engage in protected activity by urging a boycott in support of an unresolved labor dispute. *Medina Super Duper*, 286 NLRB 728, 729 (1987) (employees engaged in protected activity in handing out leaflets which "ask that you please do not shop medina super duper while employees are on strike"). See also *Rudy's Farm Co.*, 245 NLRB 43 (1979); *Roundy's Inc.*, 356 NLRB 126, 130 (2010). The Union was in the process of contesting conduct it deemed unlawful and employees were protected in urging customers not to shop at Respondent HB's stores as a way to compel a resolution of that matter.

Demotion, Reduction of Wage Rate, Reduction of Hours, and Lay Off of Fiore by Respondent Albany Avenue

The General Counsel has established a prima facie case that Respondent Albany Avenue demoted, reduced the wage rate, reduced the hours, and laid off Fiore on the basis of his union activities. Beginning in about early-January 2016, Fiore engaged in handbilling in front of both Abed stores and the Abeds were in a position to see him doing so. The record contains evidence that Sam Abed threatened to discharge employees who engaged in handbilling. On about January 16, 2016, not long after Fiore began handbilling, Respondent Albany Avenue demoted him from meat manager to butcher, reduced his pay from $31.33 to $25, and reduced his hours from 40 to 35 hours with no Sundays. At the time, Sam Abed told Fiore he was making too much money. Fiore complained to store manager Mike Carlos that $25 did not reflect the contractual "A Butcher" rate. Fiore also sent texts and left voice mail messages to Sam regarding the same concern. Such attempts to assert rights under a collective-bargaining agreement are protected by the Act.[46] *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984); *K-Mechanical Services,* 299 NLRB 114, 117-118 (1990). Meanwhile, Fiore was replaced as a meat manager by Lyons, who seems to have accepted the non-contractual rate of about $25 per hour without complaint.[47] On January 30, 2016, shortly after he complained about his change in wage rate and not long after he engaged in handbilling, Fiore was laid off. Based upon the foregoing, I find that Fiore's hand-billing was a motivating factor in Respondent Albany Avenue's decision to demote him, reduce his wage rate, and reduce his hours. Further, I find that Fiore's handbilling and his reluctance to work for a non-contractual wage rate were motiving factors in the decision to lay him off.

Respondent Albany Avenue contends that the store was attempting to cut payroll and would have demoted Fiore, reduced his wage rate, reduced his hours, and laid him off regardless of his union activities. I reject this *Wright Line* defense. Sam Abed testified that Fiore was "written up" many times and vaguely testified that Fiore was laid off for "business reasons." However, the record contains no written discipline and Sam did not describe Fiore's alleged misconduct. Further, the evidence does not indicate that Respondent Albany Avenue actually reduced meat department personnel and payroll when Fiore was demoted and subsequently laid off. Rather, Respondent Albany Avenue transferred Lyons back from Greaves Lane to replace Fiore as meat manager (when Fiore was demoted) and hired Anthony Remo (after Fiore was laid off). Respondent Albany Avenue scheduled Lyons to work more than 40 hours per week when he replaced Fiore, while Fiore had his weekly hours reduced to 35. Payroll records actually indicate that meat department gross pay increased from January to February 2016, after Fiore was laid off. Accordingly, the Respondent Albany Avenue failed to establish a *Wright Line* defense that it would have taken adverse employments actions against Fiore regardless of his union activities and affiliation. In fact, the pretextual nature of Respondent Albany Avenue's explanations tend to strengthen the assertion that those adverse actions were discriminatory.

As with Venditti, the Respondents contend that Fiore engaged in handbilling that lost the protection of the Act because the leaflets urged customers not to shop at the store. I reject this defense for the reasons stated above and find that Fiore's handbilling was protected by the Act. *Medina Super Duper*, 286 NLRB 728, 729 (1987); *Rudy's Farm Co.*, 245 NLRB 43 (1979); *Roundy's Inc.*, 356 NLRB 126, 130 (2010).

Respondent Albany Avenue Rules

In about January 2016, Respondent Albany Avenue distributed and required employees to sign a document called Rules & Regulations as a condition of employment. The General Counsel contends that Respondent Albany Avenue violated Section 8(a)(1) of the Act because the following provisions in the Rules & Regulations are overbroad and would restrict employees from engaging in union or other protected concerted activities:
SOLICITATION

Solicitation is defined as the selling of merchandise or services, charitable contributions petitions of any nature, illegal gambling items, etc. Employees may not directly or indirectly solicit other associates for any purpose during scheduled work hours while on company property, Non-Employees are not authorized on company premises at any time for the purpose of soliciting Key Food. Employees who are approached by a non-associate soliciting on company property should immediately report this to store management.

POLITICS:

YOUR COMPANY ENCOURAGES YOUR PARTICIPATION IN THE POLITICAL PROCESS. HOWEVER, SUCH ACTIVITY SHOULD BE RESTRICTED TO YOUR OWN TIME AND BE CONDUCTED AWAY FROM COMPANY PROPERTY. NO POLITICAL OR LEGISLATIVE PETITIONS SHALL BE CIRCULATED ON COMPANY PROPERTY

THERE IS TO BE NO LOITERING IN ANY SPECIFIC DEPARTMENT AT ANY TIME. (EXAMPLE: NO LOITERING IN THE DELI DEPARTMENT COMPANY TIME OR OFF COMPANY TIME. NO LOITERING IN ANY DEPARTMENT ON YOUR DAY OFF.)

IT IS IMPOSSIBLE TO COVER EVERY SINGLE ACT OR MATTER: HOWEVER, ALL EMPLOYEES ARE EXPECTED TO CONDUCT THEMSELVES PROPERLY AT ALL TIME. IMPROPER CONDUCT OR MATTERS, EVEN THOUGH NOT SPECIFICALLY MENTIONED HEREIN, WILL SUBJECT THE EMPLOYEE TO DISCIPLINE.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), the Board stated as follows:
[O]ur inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule explicitly restricts activities protected by Section 7. If it does, we will find the rule unlawful. If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Recently, in *The Boeing Co.*, 365 NLRB No. 154 (2017), the Board overturned *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to the extent it required the finding of a violation where employees would "reasonably construe" the language of a challenged rule to prohibit Section 7 activity. 365 NLRB No. 154 at *4. Instead, the Board will now balance the following two factors in determining whether a neutral policy violates the Act: (1) the nature and extent of the potential impact on NLRA rights and (2) legitimate justifications associated with the rule. In so ruling, the Board took particular issue with the decision in *William Beumont Hospital*, 363 NLRB No. 162 (2016), where "a Board majority found that it violated federal law for a hospital

to state that nurses and doctors should foster 'harmonious interactions and relationships,'....'D' 365 NLRB No. 154 at *4. The Board also determined that the new standard should be applied retroactively. 365 NLRB No. 154 at *18.

The Board, in *The Boeing Co.* case, delineated three categories of employment policies under this new standard:
• *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the "harmonious interactions and relationships" rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.

• *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

• *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. at *3-4.

I suspect that no-solicitation rules, with applicable case law which is long-standing and well-settled, will be categorized by the Board in group 3 under the new standard. No-solicitation rules are similar to rules that prohibit employees from discussing wages or benefits with one another. No-solicitation rules are generally presumed overbroad and invalid if they would exclude union solicitation during non-working times or in non-working areas. *St. John's Hospital,* 222 NLRB 1150 (1976); *Brunswick Corp.*, 282 NLRB 794, 795 (1987). Thus, although employers can ban solicitation in working areas during working time, such bans cannot extend to working areas during nonworking time. *Food Services of America, Inc.*, 360 NLRB 1012, 1018 (2014). Respondent Albany Avenue's policy was overbroad in prohibiting employees from soliciting other employees for any purpose on "company property" without excluding non-working areas as locations where solicitation may occur. Further, the rule was overbroad in restricting employees from soliciting other employees during "scheduled work hours" without clearly conveying that solicitation may still occur during lunch breaks and rest periods. *Laidlaw Transit, Inc.*, 315 NLB 79, 82 (1994); *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). The Board, with court approval, has drawn a distinction between restrictions during ""working hours," which are presumptively overbroad, and "working time," which are not. "Working time" is time spent working, excluding breaks, while "working hours" is the period, including breaks, from the beginning to the end of a shift. *Hyundai America Shipping Agency, Inc. v. NLRB.*, 805 F.3d 309, 315 (D.C. Cir. 2015); *Our Way, Inc.*, 268 NLRB 394, 395 (1983).

The no-solicitation rule is also unlawful to the extent it requires "employees who are approached by a non-associate soliciting on company property should immediately report this to store management," since this would require employees "to inform the Respondent of their union and other protected activity." *Verizon Wireless*, 365 NLRB No. 38 (2017) citing *Casino San Pablo*, 361 NLRB 1350, 1353 fn. 6 (2014). Accordingly, Respondent Albany Avenue violated Section 8(a)(1) of the Act by distributing and maintaining the Rules & Regulations which included an overbroad no-solicitation policy.

While it is less clear to me in what group the Board would place the sweeping rule against participation in the political process on company property, including the circulation of legislative or political petitions, I find the rule to be unlawful under the new standard. The Supreme Court has held that employees are protected by the Act when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship...." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (upholding Section 7 protection for distribution of literature urging employees to vote for candidates supporting a federal minimum wage increase). For example, the Board has found that employees are engaged in protected activity when they appeal to legislators or government agencies regarding their working conditions. *Riverboat Services of Indiana, Inc.*, 345

NLRB 1286, 1294-1297 (2005); *Misericordia Hospital Center*, 246 NLRB 351, 356 (1979) enfd. 623 F.2d 808 (2d Cir. 1980); *Frances House, Inc.*, 322 NLRB 516, 522-523 (1996). The language of Respondent Albany Avenue's rule on "Politics" certainly incorporates and prohibits such protective activity. Further, the Respondent Albany Avenue has articulated no reason for the prohibition, including an explanation as to why employees cannot engaged in protected political activity on non-working time and in nonworking areas. Thus, scrutinizing this particular rule under category 2, I find it unlawful.

I do not find the rule against loitering to be unlawful. I suspect that loitering rules will be judged by the Board under category 2 of *The Boeing Co.* standard. Employers have a legitimate interest in preventing employees from spending time standing around not working and potentially distracting other employees. On the other hand, as the General Counsel correctly asserts, the Board has long held illegal and overbroad an employer's restriction of access by off-duty employees to external (e.g., parking lots) and other non-working areas. *Palms Hotel & Casino*, 344 NLRB 1363 (2005) citing *Tri-County Medical Center*, 222 NLRB 1089 (1976). See also *Tecumseh Packaging Sols., Inc.*, 352 NLRB 694 (2008); *The Continental Group, Inc.*, 357 NLRB 409 (2011) affg. decision at 353 NLRB 348 (2008). Here, the loitering rule limits loitering to specific departments, which seems to refer to interior working areas. I am mindful that the Respondent Albany Avenue promulgated these rules after the Union started handbilling outside the stores, but the loitering rule does not prohibit such conduct that is not in "any specific department." Accordingly, I find the rule on loitering to be lawful.

Finally, I do not find the catch-all disciplinary prohibition against ""improper conduct" to be unlawful under the new standard. It is necessarily vague since it is a warning to employees against assuming that conduct is appropriate simply because it was not anticipated and described as inappropriate in the Rules & Regulations. This is a useful warning for employees as it likely describes the reality of any workplace, be it a union or nonunion setting. The desire of an employer to have employees engage in proper conduct also appears similar to a reasonable desire that employees maintain ""harmonious interactions and relationships." Accordingly, I find the catch-all disciplinary provision to be a category 1 rule under *The Boeing Co.* standard and lawful to maintain.

Respondent Seven Seas Refusals-to-Hire

The General Counsel contends that Respondent Seven Seas refused to hire the following A&P employees because of their union activities or activities the Union engaged in on their behalf:

Last Name	First Name	Department	Job Title
Colon	Jose Carlos	Meat	Journeyman B
Diaz	Juana	Grocery	Scanning Admin/Coordinator
Fields	Keesha	Bakery	Bakery Manager/Dir/Dept Head
Gomez	Madeline	Deli	Deli Clerk
Iturralde	Dena	Front End	Cashier/Checker
Jones	Tamika	Floral	Floral Manager/Dept Head
Maldonado	Lucy	Seafood	Seafood Manager/Dept Head
Nunez	Ricardo	Grocery	Dairy Manager
Ortega	Maria	Deli	Deli Clerk

Pagan	Elena	Front End	Cashier/Checker
Silverio	Rosa	Bakery	Bakery Clerk
Simpson	Jerry	Produce	Produce Clerk
Tirado	Natalie	Store Bakery	Bakery Clerk

In addition to these alleged discriminatees, Respondent Seven Seas did not hire producer clerk Francisco Delossantos, night stock/payout clerk Troy O'Neal, front-end/customer service clerk Sophie Henderson, and deli clerk Cesar Callendar. The record contains no evidence that Delossantos, O'Neal, Henderson and Callendar engaged in any union activity. However, the record also contains no affirmative evidence that Respondent Seven Seas hired any employees who engaged in union activities.

Respondent Seven Seas is owned by brothers Paul and Pat Conte, who own other unionized supermarkets. The Contes purchased the Food Emporium supermarket in Union Square with the understanding that it would remain unionized. Respondent

Seven Seas was not seeking to avoid successorship or its corresponding bargaining obligation. Abondolo admitted saying during negotiations that he knew the Union Square store was "heavy" in the sense that it had a large number of full-time employees. Further, it is undisputed that, on November 7, LoIacono called Pat Conte and "said that he knew that the store was very heavy and if we wanted to not hire anybody to make up a list and to send it to him." Therefore, the General Counsel does not claim that layoffs were economically unjustified or that the Contes harbored rabid antiunion animus. Rather, the General Counsel largely attributes the discriminatory motivation in these refusal-to-hire cases to Gowon and contends that Respondent Seven Seas violated the Act by relying on Gowon to recommend which employees not to employ. A hiring decision that is based upon the tainted recommendation of an individual who harbors antiunion animus will be found to be discriminatory. *Bruce Packing Co., Inc.*, 357 NLRB 1084, 1086 (2011); *KRI Constructors*, 290 NLRB 802, 812 (1988).

Gowon did express hostility toward union intervention on behalf of employees when she asked employees why they contacted the Union instead of her. Monier and the stewards testified that scheduling issues were the most prevalent among employee complaints. According to steward Juana Diaz, Gowon did not like to change the schedule once she made it. Monier and the stewards testified that Gowon would sometimes storm off after being confronted with a union complaint. The record also reflects that Gowon angrily asked Monier, after A&P declared bankruptcy, why she (Monier) even came to the store anymore now that the employees did not have a Union. This remark suggests that Gowon perceived the A&P bankruptcy as a mechanism for ridding the store of the Union and excluding the Union from employee concerns and complaints. Indeed, the record does not contain evidence that Respondent Seven Seas hired any employees who were the subject of union complaints.

On the other hand, it must be recognized that Gowon was tolerant of certain union activity and Respondent Seven Seas refused to hire certain employees who were not shown to have raised complaints to the Union's attention. Ortega handed out materials she received at union meetings in the supermarket, and Gowon did not attempt to stop her. When Monier came to the store, union stewards spent considerable time walking around the store with her and talking to employees about any concern they may have even though the contract did not provide for such union time. Diaz was not officially selected as steward, but acted in that capacity on an informal basis. Gowon often asked Diaz why she was coming to her with employee issues since Diaz was not a steward, but Gowon did reluctantly discuss these issues with Diaz.

As alluded to above, the Board addressed the standard for a discriminatory refusal-to-hire as follows in *FES*, 331 NLRB 9 (2000):

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth i, enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were

applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

With regard to the element that the General Counsel must establish concrete plans to hire, the Board added:
The General Counsel may establish a discriminatory refusal to hire even when no hiring takes place if he can show that the employer had concrete plans to hire and then decided not to hire because applicants for the job were known union members or supporters. See, e.g., *V.R.D. Decorating*, 322 NLRB 546, 551-552 (1996) (employer held to have discriminatorily refused to hire applicants where employer advertised for experienced commercial/industrial painters, received applications from known union members or supporters with experience in commercial and industrial painting, and delayed filling the advertised jobs in order to avoid making job offers to the union applicants).

Id. at fn. 7

The Board in *FES* differentiated a refusal-to-hire from a refusal-to-consider-for-hire violation, describing the latter as follows:
To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

Id. at 15.

The difference between a refusal-to-hire and refusal-to-consider-for-hire violation is that, in the former case, the employer has a job available that the alleged discriminatee is qualified to perform. Where a refusal-to-hire violation is found, the discriminatee is entitled to instatement and backpay. Id. at 12. Where a refusal-to-consider-for-hire violation is found, the discriminatee is only entitled to nondiscriminatory consideration for future openings. Id. at 15.

Conte indicated during the October 14 bargaining session that Respondent Seven Seas intended to retain all of the A&P employees (including the alleged discriminatees). Thus, the Respondent had concrete plans to hire. Even after Conte notified the Union on November 8 that certain employees would not be hired, Respondent Seven Seas retained nearly 100 A&P employees.

Respondent Seven Seas largely hired A&P employees in job titles previously held by the alleged discriminatees, which the discriminatees were qualified to perform. The record contains no evidence that the job responsibilities of A&P employees changed in any meaningful way when the store transitioned to Key Food. It appears that A&P cashier/checker Iturralde and scanning administrator Diaz were the only full-time employees in their position. However, they were both qualified to perform the work of part-timer employees who were hired into the same positions. Bakery manager Keesha Fields was not hired and the record does not contain evidence that a bakery manager was hired to replace her, but it is reasonable to assume that Fields could have performed the work of bakery clerks who were hired.[48]

The remaining question is whether anti-union animus contributed to the decision of Respondent Seven Seas not to hire the alleged discriminatees. The evidence indicates that Gowon did not want employees to go to the Union with workplace complaints

and harbored antiunion animus associated with the Union's intervention on employees' behalf. It is also supportive of a prima facie case that Respondent Seven Seas was not shown to have hired any employee who was the subject of union complaints. Therefore, the General Counsel's prima facie case with regard to the alleged discriminatees turns largely on the prominence of union activity in question and whether it is reasonable to believe that, by a preponderance of the evidence, Respondent Seven Seas refused to hire some or all of them on that basis.[49]

The General Counsel did not Establish a Prima Facie Case with Regard to Lucy Maldonado, Ricardo Nunez, Jerry Simpson, and Natalie Tirado

The General Counsel did not establish a prima facie case that the Respondent Seven Seas refused to hire Simpson because of union activity. Simpson raised a scheduling complaint to the Union's attention and Monier brought that complaint to the attention of management. However, Monier's best recollection was that this occurred before Gowon was transferred to Union Square. Therefore, the General Counsel failed to establish that Gowon was aware of any activity the Union engaged in on behalf of Simpson and recommended he not be hired on that basis.

The General Counsel did not establish a prima facie case that Respondent Seven Seas' refused to hire Nunez because of union activity. Nunez raised a single payroll issue to the Union's attention when he worked at the Six Avenue store with Gowon (then Assistant Manager of that store) in 2010. According to Monier, Gowon was not opposed to making the payroll adjustment that Nunez requested and said she would handle it (even though she never did). Accordingly, Monier contacted human resources and human resources made the change. This event occurred five years before Respondent Seven Seas refused to hire Nunez and does not appear to have been contentious. The Union's activity on behalf of Nunez was minimal, isolated, and extremely remote in time. Evidence that Gowon was tolerant of certain union activity and that Respondent Seven Seas did not hire certain employees who engaged in no union activity (and were not the subject of Union activity on their behalf) also undermines a claim that Gowon was hostile toward any employee who was associated with the Union and exclusively concerned with removing such employees from the work force. Accordingly, the General Counsel has not established a preliminary case by a preponderance of the evidence that Respondent Seven Seas refused to hire Nunez, in whole or in part, on the basis of union activity.

The General Counsel failed to establish a prima facie case that Respondent Seven Seas refused to hire Lucy Maldonado because of union activity. In about early-2015, Monier advised Gowon that Maldonado's vacation time was incorrect and Monier said she would look into it. Monier followed up once with Gowon, but Gowon had not addressed the issue. Although Monier did contact human resources, Maldonado went out on workers compensation leave and Monier did not recall how or whether Maldonado's vacation issue was resolved. The event was less remote in time than the issue raised on behalf of Nunez, but the record failed to demonstrate that human resources actually contacted Gowon or did anything about it. The Union's activity on behalf of Maldonado was minimal, isolated, and lacking in any evidence of contentiousness with Gowon. Evidence that Gowon was tolerant of certain union activity and that Respondent Seven Seas did not hire certain employees who engaged in no union activity (and were not the subject of union activity on their behalf) also undermines a claim that Gowon was hostile toward any employee who was associated with the Union and exclusively concerned with removing such employees from the work force. Under the circumstances, the General Counsel has not established a preliminary case by a preponderance of the evidence that Respondent Seven Seas refused to hire Maldonado, in whole or in part, on the basis of union activity.

The General Counsel failed to establish a prima facie case that Respondent Seven Seas refused to hire Natalie Tirado because of union activity. When the 87th Street store closed, Monier complained to Gowon about transferring Tirado to the Union Square bakery department instead of a cashier's position. Monier noted that Tirado had an accommodation to sit while working as a casher, but could not sit while working in the bakery. Gowon summarily rejected Monier's request without explanation. Therefore, Monier arranged with Smith (then the store manager of Union Square) to have Tirado moved to a cashier position and work while seated. Although we do not know exactly when this occurred, it was an isolated incident that probably occurred before 2015. Further, although Gowon seems to have been abrupt and largely unresponsive when Monier asked why Tirado was not transferred to a cashier position, there is no evidence that Gowon had any further involvement in the matter or that she was adversely affected by it in any way. Evidence that Gowon was tolerant of certain union activity and that Respondent Seven

Seas did not hire certain employees who engaged in no union activity (and were not the subject of union activity engaged in on their behalf) also undermines a claim that Gowon was hostile toward any employee associated with the Union and exclusively concerned with removing such employees from the workforce. Under the circumstances, I do not believe the General Counsel has established a preliminary case by a preponderance of the evidence that Respondent Seven Seas refused to hire Tirado on the basis of union activity.

The General Counsel Established a Prima Facie Case with Regard to Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio

The General Counsel established a prima facie case that Respondent Seven Seas refused to hire Keesha Fields because of union activity. Fields requested time off for surgery in about April or May and Gowon actively opposed the request because she wanted Fields at work to run the bakery. In this situation, the Union did not just go to human resources in order to implement a request that Gowon did not oppose. Rather, the Union went over Gowon's head to successfully reverse a decision Gowon made. Indeed, scheduling was the primary issue of contention the Union had with Gowon when it came to matters of contract administration and the issue involving Fields was contentious. Gowon expressed hostility toward employees who solicited union intervention and the activity was not particularly remote in time from the relevant hiring decisions in November. The absence of any evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Fields.

The General Counsel established a prima facie case that Seven Seas' refused to hire Madeline Gomez because of union activity. The evidence indicated that union activity on behalf of Gomez was quite prominent with regard to safety and scheduling complaints. When Gomez first came to the Union Square store, Monier complained to Gowon that Gomez was concerned about using the slicer without adequate training. Gowon abruptly rejected this complaint, but Monier was able to go over Gowon's head and obtain a commitment from human resources to train Gomez on the slicer before she would be required to work with it. Monier also came to the store in response to other safety issues raised by Gomez, including exposed wiring and a problem with the slicer's safety switch. According to Monier, she came to the store regarding safety complaints raised by Gomez about four times in 2015. On these occasions, Gowon seemed upset and said to Gomez, “why didn't you just speak to me about it? Why do you have to call Margaret? I'll take care of it.” These comments suggest antiunion animus specifically directed at Gomez. The absence of evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Gomez.

The General Counsel established a prima facie case that Respondent Seven Seas refused to hire Elena Pagan because of union activity. Gowon rejected a union assertion that Pagan (a full-time employee who had been reduced to part-time) was not receiving the minimum hours for a part-time employee. Scheduling was the Union's primary issue of contention with Gowon and a constant source of friction. The Union filed a grievance regarding the transition of certain employees from full-time to part-time. Monier went over Gowon's head to human resources with regard to Pagan's scheduling issue and was able to have the matter resolved in a manner contrary to Gowon's wishes. Gowon was hostile toward employees who were the subject of such union intervention. The absence of evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Pagan.

The General Counsel established a prima facie case that Respondent Seven Seas refused to hire Rosa Silverio because of union activity. Diaz talked to Gowon about a chronic seniority related scheduling problem Silverio complained about on an ongoing and regular basis. Scheduling was the Union's primary issue of contention with Gowon and a constant source of friction. Further, not long before the closing, stewards met with Gowon because she refused to give Silverio a day off to have her home inspected. Accordingly, the Union's activity on behalf of Silverio was quite prominent and Gowon was hostile toward employees who were the subject of such union intervention. The absence of evidence that Respondent Seven Seas hired employees who engaged in

or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Silverio.

The General Counsel established a prima facie case that Seven Seas' refused to hire Jose Carlos Colon because of union activity. Jones and Monier talked to Gowon about a chronic problem Colon had with scheduling "split shifts" and late shifts. Scheduling was the Union's primary issue of contention with Gowon and a constant source of friction. Accordingly, the Union's activity on behalf of Colon was quite prominent and Gowon was hostile toward employees who were the subject of such union intervention. Further, although the evidence does not indicate exactly when these issues arose, they occurred at Union Square when Gowon was General Manager (i.e., not too long before the transitioned to Key Food). The absence of evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Colon.

Among non-steward employees, the General Counsel established its strongest prima facie case in connection with the refusal to hire Maria Ortega because of union activity. Ortega was known by Gowon to have attended union meetings with the stewards and to have handed out union literature at the store. Monier sometimes called the store to speak with Ortega regarding these matters and Ortega transferred some of Monier's call to Gowon. Ortega also translated for employees when they wanted to raise workplace issues with Gowon. In addition, Ortega was, herself, the subject of certain union complaints. During the winter before the sale of the store, the Union and Ortega repeatedly complained to Gowon about the door being left open and the cold temperature in the café' where Ortega worked. The Union and Ortega also repeatedly complained to Gowon about Ortega not being assigned to work Sundays while less senior part-time café' employees received Sunday overtime. This culminated in a contentious interaction between Gowon and Ortega on November 6 (just 2 days before the Union was notified that Ortega would not be hired). Ortega's protected activities were prominent, regular, numerous and close in time to the decision by Respondent Seven Seas not to employ her. The absence of evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a *prima facie* case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Ortega.

The General Counsel established a prima facie case that Respondent Seven Seas refused to hire stewards Tamika Jones, Dena Itturalde, and Juana Diaz because of union activity. Although Diaz acted as a steward in an informal capacity, she effectively functioned as a steward and arguably had the most contentious relationship with Gowon. The stewards raised employee complaints to Gowon's attention and participated in meetings between Gowon and Monier. Diaz also regularly complained to Gowon about being passed over for Sunday overtime herself in favor of a less senior part-time employee. Among employees in the Union Square store, these stewards engaged in union activity that was the most prominent, regular and numerous, and Gowon demonstrated anti-union animus toward such activity. The absence of evidence that Respondent Seven Seas hired employees who engaged in or were the subject of union activity also supports a prima facie case. Under the circumstances, the General Counsel established a preliminary case by a preponderance of the evidence that union activity contributed to Respondent Seven Seas' refusal to hire Jones, Iturralde and Diaz.

The General Counsel Failed to establish that Respondent Seven Seas violated the Act by Refusing to Hire Highly Paid A&P Employees

As an alternative theory, the General Counsel contends that Respondent Seven Seas violated Section 8(a)(3) and (1) by refusing to hire highly paid A&P employees. The record in this case does indicate that Paul Conte, at a meeting with the Union in December, expressed unhappiness with Local 342 employees who do not cooperate by working under the table. This statement would go a long way toward establishing a discriminatory refusal-to-hire violation if the record contained evidence that Respondent Seven Seas hired employees off the street or retained unit employees who were willing to work for lower wage rates than those defined in the old Food Emporium contract. However, the record contains no such evidence and the General Counsel

does not contend that Respondent Seven Seas discriminated against employees on that basis. Rather, citing *Sierra Realty Corp.*, 317 NLRB 832, 833 (1995), the General Counsel contends that Respondent Seven Seas violated the Act by selecting lower paid employees for hire among former A&P employees who were all paid (and continue to be paid) pursuant to the terms of the same collective-bargaining agreement. As noted above in previous sections of this decision, I disagree with the General Counsel's interpretation of the law.

Throughout negotiations, the Union maintained its position that A&P employees should retain their current wages upon being hired by Key Food stores. The Union admitted during negotiations that the Union Square store had a large number of highly paid full-time employees and asked the Contes which employees they did not want to hire. Under these circumstances, Respondent Seven Seas was not prohibited by Section 8(a)(3) and (1) of the Act from selecting employees for hire on the basis of their respective wage rates as this would constitute a valid economic decision instead of a decision based on union affiliation. *Vantage Petroleum Corp.*, 247 NLRB 1492 (1980); *Sierra Realty Corp.*, 82 F.3d 494 (DC Cir. 1996).

Respondent Seven Seas' Wright Line Defense

Respondent Seven Seas did not make out a *Wright Line* defense that Colon, Diaz, Fields, Gomez, Iturralde, Jones, Ortega, Pagan, and Silverio would not have been hired regardless of union activity. The Conte brothers were admittedly unfamiliar with the workforce before they took over the Union Square store. Therefore, they relied on the recommendations of Gowon. Pat Conte testified to that effect upon questioning by the General Counsel and this testimony was consistent with the affidavit he provided during the Regional investigation. I do not credit Pat's testimony, late in the trial, that he relied primarily on the recommendations of Union Square Director of Security Mac McBrien. Conte did not mention McBrien in his affidavit and his response to earlier questioning by the General Counsel. Further, even after he testified about McBrien, Pat again admitted that Gowon was involved in the hiring decisions.

Respondent Seven Seas did not call Gowon to offer any contrary explanation of her hiring recommendations. Respondents' counsel represented during the trial that Gowon was no longer employed by Respondent Seven Seas, but the record does not contain evidence of the same and, in any event, Gowon's severance does not explain her failure to testify. Even if she were reluctant to testify, the parties have subpoena power. More importantly, even if her failure to testify were explained, the absence of such testimony does not absolve the Respondent Seven Seas of its burden of establishing a *Wright Line* defense that employees would not have been hired regardless of union activity.[50]

Surveillance and/or Creating the Impression of Surveillance

The General Counsel alleges that Respondent Seven Seas, by Pat Conte, engaged in surveillance or created the impression of surveillance by using his phone as a camera during the hearing of this case. I reject this contention. Ortega testified that, during a break in the trial, Pat held his phone in front of him as if to take a "selfie." The record contains no evidence that Pat pointed the ""camera" at an employee or witness in such a manner as to give the subject the impression that he/she was being photographed or recorded. Pat did take a selfie, but no employee or witness appeared in the picture. He also credibly testified that it was not his intention to take a picture of Ortega or anyone else. Accordingly, I will dismiss the allegation that Respondent Seven Seas engaged in surveillance of employees' protected activity or created the impression that such activity was under surveillance.

iii. instatement/reinstatement

The complaint alleges that Respondent HB failed to reinstate employees who were unlawfully laid off. Catalano testified that he told Abondolo that Respondent HB would take Quiles or Maffia back as meat manager, and confirmed this offer in a letter to the Region. Otherwise, the Respondents have not offered instatement or reinstatement to any employees at issue in this case. I do not find that Quiles and Maffia received valid offers of instatement or reinstatement, respectively.

The Board has found "that offers of reinstatement conveyed to employees through the medium of their bargaining representative are valid offers of reinstatement." *Lipman Bros., Inc.,* 164 NLRB 850, 851 (1967), citing *Art Metalcraft Plating Co., Inc.*, 133 NLRB 706, 707 (1961), enfd. 303 F.2d 478 (3rd Cir. 1962). However, an offer of reinstatement to be valid must be "firm, clear, specific, and unconditional." *Krist Oil Co., Inc.*, 328 NLRB 825, 827 (1999). Here, Catalano testified that, during a telephone call with Abondolo, he asked whether the Union wanted employees back, but Abondolo refused the offer. Rather, Abondolo allegedly said he would get them jobs himself. It was not clear from Catalano's testimony that the Union received specific jobs offers for specific stores on behalf of Quiles and/or Maffia. Further, although Abondolo was quite open in his testimony about his failure to recall a number of events, he did demonstrate a spontaneous and adamant recollection of certain facts. Thus, when Abondolo was asked whether Catalano offered to reinstate Quiles and/or Maffia, Abondolo was credible in his denial that Catalano ever offered anyone his/her job back. Indeed, Catalano implied that there may have been some ambiguity with regard to the offers of reinstatement when he indicated in a position statement to the Region, "*to eliminate any doubt* as to the fact that HB Food Corp. had offered employment to Nelson Quiles and/or Richard Maffia to be its Meat Manager, HB Food Corp, unconditionally, in this letter, offers employment to either one of them to be Its Meat Manager." [Emphasis added] Finally, the General Counsel presented compelling evidence that it was contrary to the Union's practice and particularly impractical in November (when so many former A&P employees had been laid off) for the Union to deny a job offer on behalf of a union member and misrepresent that the Union would be able to find that member a job. Based on the forgoing, I do not find that Respondent HB made a clear, specific and valid offer of instatement or reinstatement to Quiles or Maffia.

It is true that, in Catalano's December 23 position statement to the Region, Respondent HB made a clear and specific offer to employ at least one of the employees, Quiles or Maffia, to the position of meat manager. However, the Board imposes on an employer who has unlawfully discharged employees the obligation to remedy its unlawful action "by seeking out the employees and offering reinstatement." *Hickory's Best, Inc.*, 267 NLRB 1274, 1275 (1983), quoting *Southern Greyhound Lines*, 169 NLRB 627, 628 (1968). Accordingly, the Board has held that an employer may not extinguish an employee's backpay and reinstatement rights by communicating an offer of reinstatement to the General Counsel, particularly where, as here, the government has expressly disavowed any intention to communicate that offer to the employee in question. *Hickory's Best, Inc.*, 267 NLRB at 1275.

iv. the respondents' joint employer status

The complaint alleges that Respondent Key Food is a joint employer with each co-operative member-owner that is named as a Respondent. In *Hy-Brand Industrial Contractor's, LTD.*, 365 NLRB No. 156 (2017), the Board overruled the joint employer standard in *Browning-Ferris Industries of California, Inc.*, 362 NLRB 1599 (2015), and any allowance therein for the finding of joint employer status based on a putative employer's limited, routine, indirect or reserved (but unexercised) control over employees' terms and conditions of employment. 365 NLRB at *1. Rather, in *Hy-Brand*, the Board stated that each joint employer must be shown to have exercised "direct and immediate" control over employees' terms and conditions of employment. The Board also determined that its retraction of the *Browning-Ferris* standard would not result in manifest injustice if it is applied retroactively. 365 NLRB at *31. I find, under the *Hy-Brand* standard, that the Respondents are joint employers as alleged in the complaint in that they jointly exercised direct and immediate control over employees' terms and conditions of employment. The context of this case involves a bankruptcy proceeding in which Respondent Key Food orchestrated the purchase of A&P stores with the overriding object of purchasing as many stores as possible. To that end, Respondent Key Food provided members with information and organized an internal bidding process to allocate A&P stores to Key Food members. Respondent Key Food purchased stores itself through two newly formed corporate member-owners and financed the purchase of stores by loaning other member-owners 70 percent of the purchase price. Respondent Key Food entered into the APA with A&P and obtained its approval by the bankruptcy court. The approved APA dictates to what extent the successor Key Food stores would be required to retain former A&P employees and the old A&P collective-bargaining agreements. To the extent the APA did not require Key Food stores to assume the A&P collective-bargaining agreements, the APA required Key Food purchasers to negotiate in good-faith for modified collective-bargaining agreements and/or implement a last best offer. Indeed, the APA, negotiations referenced therein, and the Respondents' unilateral implementation of terms and conditions of employment are directly at issue in this unfair labor practice case.

Respondent Key Food and its member-owners banded together in order to negotiate common collective-bargaining agreements that would cover all of the stores that were purchased through the A&P liquidation. Respondent Key Food retained Catalano as the lead labor lawyer to negotiate these contracts on its behalf and on behalf of other member-owners. Catalano was retained and paid by Respondent Key Food. However, the money for Catalano's legal services apparently came from a fee Respondent Key Food charged the member-owners who purchased A&P stores. Respondent Key Food and its member-owners refused, for the most part, to negotiate independently with the Union even though the Union requested separate negotiations with the member-owner of each store. In fact, Catalano vigorously objected to attempts by the Union to reach out directly to owners in order to engage in individual bargaining. Negotiations were handled primary by Catalano and Konzelman, often without individual owners present.

Although the Respondents claim that Respondent Key Food had no involvement in the personnel decisions of stores it did not own itself, the record belies this assertion. The Union's objection to layoffs and offers of employment (or lack thereof) were fielded and addressed by Catalano and Konzelman. It was Catalano who addressed O'Leary's complaints regarding Quiles and Maffia, and who attempted to resolve those matters with the Union. When the Union, on October 15, requested the specific positions that would be filled at each store by A&P employees, it was Konzelman who responded and declined to provide that information. And from investigation to trial, it has been Catalano who represented all the Respondents in connection with these unfair labor practice charges.

This is truly a case in which Respondent Key Food and the Respondent member-owners acted directly, immediately and jointly through common representatives for purposes of addressing the terms and conditions of employment of unit employees.

The Respondents nevertheless contend that individual Respondent member-owners were not statutory employers because they did not employ any employees. However, in its answer to the complaint, each of the Respondents admitted that, "at all material times," they have been employers within the meaning of Section 2(2) of the Act. Accordingly, whether Respondents were employers was not an issue to be litigated and will not be entertained as a defense at this stage in the case.

I note, however, that the Respondent member-owners were clearly employers when the vast majority of the unfair labor practices took place. Frank Almonte made coercive statements on about September 6, 2015, before the Howard Beach Waldbaums transitioned to Key Food, but the Board has held companies liable for violating the act when they coercively act upon the employee of a different company. *A. M. Steigerwald Co.,* 236 NLRB 1512, 1515 (1978) ("the specific language of the Act clearly manifests a legislative purpose to extend the statutory protection of Section 8(a)(1) beyond the immediate employer-employee relationship").

Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The remedies of instatement and backpay are appropriate for discriminatory refusals-to-hire, and I will order Respondents Seven Seas and HB to provide those remedies to the extent possible. Obviously, Quiles is deceased and not subject to instatement. *FES*, 331 NLRB 9 (2000).

The standard remedies for unilateral economic layoffs, like discriminatory layoffs or discharges, are reinstatement and full backpay, and I will order Respondents who engaged in such unlawful conduct to provide these remedies. *Print Fulfillment Servs. LLC*, 361 NLRB 1243, *6-7 (2014); *Eugene Iovine*, 353 NLRB 400, 409 (2008). Further, to the extent the Respondents unlawfully changed the wage rates and hours before laying employees off, backpay calculations for the layoffs shall be based on the wage rates and hours that employees received before those terms of employment were unlawfully altered. Thus, backpay resulting from the layoffs of Gina Cammarano, Debra Abruzzese, Michael Fischetti and Anthony Venditti will be based on their

weekly hours worked before Respondent Greaves Lane unlawfully reduced the work days of all employees on about November 25. Backpay resulting from the layoff of Robert Jenzen will be based on his work hours before Respondent Albany Avenue unlawfully reduced his work days in about late-December and further reduced his hours in mid-January 2016. Backpay resulting from the layoff of Stephen Fiore will be based on his wage rate and work hours before he was unlawfully demoted with a corresponding reduction in pay rate and his weekly work hours were reduced on about January 16, 2016.

Respondents Greaves Lane and Albany Avenue will be order to rescind unlawful changes in the work days, work hours, and pay rates of employees. Further, Respondent Albany Avenue will make Fiore whole by paying him the difference in his pay before about January 16, 2016, (when his wage rate and hours were reduced) and his pay thereafter until he was laid off. Respondent Albany Avenue will make Jenzen whole by paying him the difference in his pay before about late-December, when his work hours were first reduced, and his pay thereafter until he was laid off. Respondent Greaves Lane will make whole employees by paying them the difference between their pay before about November 25, when their work days were reduced.

Backpay for the unlawful refusals-to-hire and layoffs shall be calculated in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as required in *Kentucky River Medical Center,* 356 NLRB 6 (2010), enf. denied on other grounds sub.nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the applicable Respondents shall compensate employees who were unlawfully denied employment or laid off for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Backpay for reductions of pay resulting from the reduction of hours or wage rate shall be calculated in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970) instead of *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with daily compounded interest. See *Community Health Services, Inc.*, 361 NLRB 333 (2014) (that interim earnings should not be deducted in applying the *Ogle Protection Service* backpay formula, when the employment of employees is not severed, falls within the bounds of the Board's broad remedial discretion).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), backpay computations shall compensate employees for any adverse tax consequences of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 29 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

All of the Respondents will be ordered to resume bargaining with the Union for a collective-bargaining agreement.

Having found that Respondent CS2 unlawfully bypassed the Union and dealt directly with Mariano Rosado regarding a severance agreement, I will require the Respondent to rescind that severance agreement upon request by the Union. Presumably, bargaining on severance and a severance agreement would be part of overall negotiations for a contract, but the parties may negotiate the issue of Rosado's severance separately as long as such bargaining is conducted in good-faith and comports with applicable law.

ORDER[51]

1. The Respondents shall CEASE AND DESIST from engaging in the following conduct:

A. Respondent HB, a joint employer, which consists of Key Food Stores Co-Operative, Inc. (Key Food) of Staten Island, New York and HB 84 Food Corp. of Howard Beach, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Interrogating employees about union activities.

(2) Refusing to hire employees because of their union activities.

(3) Causing a different employer to lay off employees because of their union activities.

(4) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as General Counsel's Exhibit 5.

(5) Unilaterally laying off unit employees without notifying and giving the Union, United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) an opportunity to bargain.

(6) Refusing to reinstate employees who are unlawfully laid off.

(7) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

B. Respondent Greaves Lane, a joint employer, which consists of Key Food of Staten Island, New York and 100 Greaves Lane Meat LLC of Staten Island, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Laying off employees because of their union activities.

(2) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Pathmark Stores, Inc., which was entered into the record of this case as General Counsel's Exhibit 4.

(3) Unilaterally laying off unit employees without notifying and giving the Union an opportunity to bargain.

(4) Refusing to reinstate employees who are unlawfully laid off.

(5) Unilaterally reducing the workdays of unit employees without notifying and giving the Union an opportunity to bargain.

(6) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

C. Respondent Albany Avenue, a joint employer, which consists of Key Food of Staten Island, New York and 1525 Albany Avenue Meat LLC of Brooklyn, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Maintaining overly broad rules that prohibit employees from engaging in protected solicitation and political activities on non-working times and in nonworking areas, and require employees to report protected activities to management.

(2) Laying off or discharging employees because of their union activities.

(3) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Pathmark Stores, Inc., which was entered into the record of this case as General Counsel's Exhibit 4.

(4) Unilaterally laying off unit employees without notifying and giving the Union an opportunity to bargain.

(5) Refusing to reinstate employees who are unlawfully laid off.

(6) Demoting employees, reducing the work hours of employees, and/or reducing the wage rates of employees because of their union activities.

(7) Unilaterally demoting, reducing the work hours, and/or reducing the wage rate of unit employees without notifying and giving the Union an opportunity to bargain.

(8) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

D. Respondent Seven Seas, a joint employer, which consists of Key Food of Staten Island, New York and Seven Seas Union Square, LLC of Manhattan, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Refusing to hire employees because of their union activity or because the Union engaged in activities on the employees' behalf.

(2) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Food Emporium, which was entered into the record of this case as GC Exh. 3.

(3) Unilaterally laying off unit employees without notifying and giving the Union an opportunity to bargain.

(4) Refusing to reinstate employees who are unlawfully laid off.

(5) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

E. Respondent CS2, a joint employer, which consists of Key Food of Staten Island, New York and Key Food CS2, LLC, d/b/a Food Universe of Bayside, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as GC Exh. 5.

(2) Unilaterally laying off unit employees without notifying and giving the Union an opportunity to bargain.

(3) Refusing to reinstate employees who are unilaterally laid off.

(4) Bypassing the Union and dealing directly with unit employees regarding their wages, hours and other terms and conditions of employment.

(5) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

F. Respondent Riverdale, a joint employer, which consists of Key Food of Staten Island, New York and Riverdale Grocers LLC of the Bronx, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Food Emporium (Retail Industry Agreement New York Division), which was entered into the record of this case as GC Exh. 6.

(2) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

G. Respondent Glen Oaks, a joint employer, which consists of Key Food of Staten Island, New York and Jar 259 Food Corp. of Glen Oaks, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as GC Exh. 5.

(2) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

H. Respondent Park Plaza, a joint employer, which consists of Key Food of Staten Island, New York and Park Plaza Food Corp. of Glen Head, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as GC Exh. 5.

(2) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act

I. Respondent Paramount, a joint employer, which consists of Key Food of Staten Island, New York and Paramount Supermarkets, Inc. of Queens, New York, and Brooklyn, New York, its offers, agents, successors, and assigns, shall cease and desist from

(1) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit at its Queens, New York facility as set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as GC Exh. 5.

(2) Failing and refusing to meet and bargain with the Union as the exclusive representative of the bargaining unit at its Brooklyn, New York facility as set forth in the collective-bargaining agreement between the Union and Great Atlantic & Pacific Tea Company, Inc., which was entered into the record of this case as GC Exh. 7.

(3) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. The Respondents shall take the following AFFIRMATIVE ACTION necessary to effectuate the policies of the Act.

A. Respondent HB shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as General Counsel's Exhibit 5.

(2) Before laying off bargaining unit employees for economic reasons, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above in paragraph 2(A)(1) of this Order.

(3) Within 14 days from the date of this Order, offer Khadisha Diaz, Richard Maffia, and Venus Nepay full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(4) Make Khadisha Diaz, Richard Maffia, and Venus Nepay whole for any loss of earnings and other benefits suffered as a result of their unlawful layoffs in the manner set forth in the remedy section of this decision.

(5) Compensate Khadisha Diaz, Richard Maffia, and Venus Nepay for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(6) Compensate Khadisha Diaz, Richard Maffia, and Venus Nepay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(7) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(8) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix A."[52] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2015.

(9) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent Greaves Lane shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Pathmark Stores, Inc., which was entered into the record of this case as GC Exh. 4.

(2) Before laying off bargaining unit employees for economic reasons or reducing their work days, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above in paragraph 2(B)(1) of this Order.

(3) Rescind the unlawful change in the work days of unit employees.

(4) Within 14 days from the date of this Order, offer Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(5) Make Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti whole for any loss of wages or benefits suffered as a result of their unlawful layoffs in the manner set forth in the remedy section of this decision.

(6) Compensate Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(7) Make whole unit employees for any loss of earnings and other benefits suffered as a result of the unlawful reduction of their work days from 6 days to 5 days per week, with a corresponding reduction in pay, in the manner set forth in the remedy section of this decision.

(8) Compensate all employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(9) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(10) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix B."[53] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2015.

(11) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. Respondent Albany Avenue shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Pathmark Stores, Inc., which was entered into the record of this case as (GC Exh. 4).

(2) Before laying off bargaining unit employees for economic reasons or reducing their workdays, work hours or wage rates, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above in paragraph 2(C)(1) of this Order.

(3) Rescind the unlawful changes in the workdays, work hours and wage rates of unit employees.

(4) Notify all employees in writing that overly broad rules on solicitation and politics contained in the "Key Food Rules & Regulations" are rescinded, void, of no effect and will not be enforced. Further, notify all employees in writing that Respondent Albany Avenue will not prohibit employees from engaging in solicitation and political activity in a manner protected by the Act, and will not require employees to report such activity to management.

(5) Within 14 days from the date of this Order, offer Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(6) Make Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore whole for any loss of wages or benefits suffered as a result of their unlawful layoffs or discharge in the manner set forth in the remedy section of this decision.

(7) Compensate Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore for search-for-work and interim employment expenses following their layoffs regardless of whether those expenses exceed their interim earnings.

(8) Make Robert Jenzen whole for the unlawful reductions in his work days and work hours in the manner set forth in the remedy section of this decision.

(9) Make Stephen Fiore whole for the unlawful demotion, reduction of wage rate, and reduction of work hours in the manner set forth in the remedy section of this decision.

(10) Compensate all employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(11) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(12) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix C."[54] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2015.

(13) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

D. Respondents Seven Seas shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and The Food Emporium, which was entered into the record of this case as GC Exh. 3.

(2) Before laying off bargaining unit employees for economic reasons, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above in paragraph 2(D)(1) of this Order.

(3) Within 14 days from the date of this Order, offer Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio instatement to the positions they held as employees of The Great Atlantic & Pacific Tea Company, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(4) Within 14 days from the date of this Order, offer Ayanna Jordan full reinstatement to her former position, or, if that position no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(5) Make Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio whole for any loss of wages or benefits suffered as a result of the unlawful refusal to hire them in the manner set forth in the remedy section of this decision.

(6) Make Ayanna Jordan whole for any loss of wages or benefits suffered as a result of her unlawful layoff in the manner set forth in the remedy section of this decision.

(7) Compensate Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio for search-for-work and interim employment expenses following their layoffs regardless of whether those expenses exceed their interim earnings.

(8) Compensate all employees entitled to backpay for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(9) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(10) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix D."[55] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2015.

(11) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

E. Respondent CS2 shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as (GC Exh. 5).

(2) Before laying off bargaining unit employees for economic reasons, notify and, upon request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above in paragraph 2(E)(1) of this Order.

(3) Upon the Union's request, rescind the severance agreement signed by Mariano Rosado.

(4) Within 14 days from the date of this Order, offer Mariano Rosado full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(5) Make Mariano Rosado whole for any loss of earnings and other benefits suffered as a result of his unlawful layoffs in the manner set forth in the remedy section of this decision.

(6) Compensate Mariano Rosado for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings.

(7) Compensate Mariano Rosado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for the employee.

(8) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(9) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix E."[56] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2016.

(10) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

F. Respondent Riverdale shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Food Emporium (Retail Industry Agreement New York Division), which was entered into the record of this case as GC Exh. 6.

(2) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix F."[57] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

(3) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

(G) Respondent Glen Oaks shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as General Counsel's Exhibit 5.

(2) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix G."[58] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

(3) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

H. Respondent Park Plaza shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as (GC Exh. 5).

(2) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix H."[59] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

(3) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

I. Respondent Paramount shall

(1) To reach a collective-bargaining agreement, meet and bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit at its Queens, New York facility as set forth in the collective-bargaining agreement between the Union and Waldbaums Supermarket, Inc., which was entered into the record of this case as (GC Exh. 5).

(2) To reach a collective-bargaining agreement, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit at its Brooklyn, New York facility as set forth in the collective-bargaining agreement between the Union and Great Atlantic & Pacific Tea Company, Inc., which was entered into the record of this case as GC Exh. 7.

(3) Within 14 days after service by the Region, post at its facilities copies of the attached notice marked "Appendix I."[60] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed one or both of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 2016.

(4) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 9, 2018

1 For convenience, herein, each pair of Respondents will be referred to by the corporate name of the member-owner, such as Respondent Seven Seas instead of Respondents Seven Seas and Key Food. Unless stated otherwise, it will be understood that Respondent Seven Seas refers to Respondents Seven Seas and Key Food as alleged joint employers.

2 At trial, the General Counsel withdrew the allegation that Troy O'Neal was unlawfully refused employment.

3 Respondent Key Food purchased two A&P stores through corporations that are now members of the cooperative. Respondent CS2 is the member-owner of one of those stores. The other corporate store (CS3) is not involved in this proceeding. [Tr. 583.]

4 Unless stated otherwise, all dates refer to 2015.

5 The General Counsel does not base its case on successorship clauses in collective-bargaining agreements. Rather, the failure to bargain allegations are based on statutory successorship under the Act.

6 Department heads are classified as "managers" (e.g., the department head of the meat department is the "meat manager"). However, neither party asserted that the department managers have supervisory or managerial authority. Rather, department heads have historically been included in the A&P bargaining units.

7 The Respondents' proposal attached to the letter as Exhibit B was more favorable than the original proposal of July 29 and less favorable than the proposal as later revised on September 22.

8 The September 22 revisions to the Respondent's September 17 proposal are reflected by the strikethroughs in par. 4(b) changing $21.01 and $20 to $23.01 and $23, respectively, and changing $6000 to $8000 in par. 5.

9 O'Leary and Solicito led negotiations for the Union on October 12. O'Leary took over from Solicito as lead negotiator when she suspected that Catalano was preparing to declare impasse.

10 The "Key Food industry agreement" did not refer to a single agreement, but a number of similar collective-bargaining agreements between Key Food stores and the Union. O'Leary produced at this bargaining session, as an example of a Key Food industry agreement, the collective-bargaining agreement between the Union and Key Food Quick Pick #5330. [GC 80] [Tr. 233-235].

11 I do not credit Catalano's assertion that the Union, on October 12, indicated a willingness to accept a partial contract such as Respondent Key Food's September 22 proposal on a long-term basis. According to both sets of union notes, O'Leary argued in favor of using the Key Food industry agreement before and after the isolated quotes that were reference by Catalano. In fact, it is uncontested that Catalano ultimately conceded, as described in union notes, "[t]here are pieces in the Key Food agreement that we would agree to. Some of it can work, most of it can't.'D' [R. 30 p. 9.] The last sentence of those notes show O'Leary saying, "Look at Key Food for a basis of an agreement." [R. 30 p. 13.] Further, as discussed below, it is undisputed that on October 19 the Union continued to request that the Respondents accept the Key Food industry agreement as the basis for a contract. Catalano's own notes suggest that the Union was conditioning a 42-month contract on a complete agreement that used the Key Food industry agreement to fill in outstanding provisions. Catalano's notes state "2- 42 mos → Key Food industry agreement but not wall to wall. . . ." [GC 35] [R. 22-23].

12 This language indicates that an employee would not retain recall rights if he/she were separated during the probationary period.

13 The email was written by D'Ammassa, not Abondolo. [Tr. 1042] [GC 17].

14 This store was referred to on the record as the Howard Beach or Lindenwood store.

15 At some point, Anthony Almonte replaced Gilbert Almonte as a 50 percent owner of Respondent HB.

16 October 24 was a Saturday and October 23 was a Friday. On October 23, Business Representative Liz Fontanez sent Booras an email, which stated that Quiles "just called" Fontanez and told her Britt said Key Food would not be hiring him. [GC 63.]

17 At this or a previous meeting, the Almontes told Britt they would retain him as store manager once the store was purchased by Respondent HB. [Tr. 1653]

18 I accepted the Quiles affidavit into evidence over the Respondents' hearsay objection under Rule 807 of the Federal Rules of Evidence (the residual exception). I note that Quiles was unavailable because he is deceased and the record contains admissible non-hearsay corroborative evidence that he and the Almontes were where the affidavit places them on relevant dates. Further, and more importantly, the Respondents made no attempt to dispute statements in Quiles' affidavit even though I admitted the affidavit into evidence. In particular, the Respondents did not call Frank Almonte to deny statements attributed to him on September 6. Under these circumstances, the factual statements in the affidavit of Quiles, now deceased and unable to testify, have guarantees of trustworthiness equivalent to other hearsay exceptions in Rules 803 and 804. Accordingly, admitting the affidavit into evidence will best serve the interests of justice and I confirm my decision to do so.

19 At trial, I sustained a hearsay objection to testimony by Fontanez that Monegro told her he was being paid in cash. However, Fontanez's testimony that Castillo and Monegro were hired and paid in cash is corroborated by the testimony of Gilbert and Diaz in the sense that it would explain why they were hired in November and did not appear on the payroll until March 11. Accordingly, I reverse my trial ruling and give some weight to the testimony of Fontanez as corroborated hearsay.

20 Accordingly, given that the payroll records are consistent with Maffia's time card, it is reasonable to concluded that Massia actually refers to Maffia, and Maffia was paid for the day he worked.

21 It is entirely possible that meat department employees did not work Tuesday, November 10, and Gilbert was advised that they were pulled out of work by the Union. Gilbert may have conflated Monday (when Maffia showed up for work) and Tuesday (when Maffia did not work), thereby believing that Maffia actually showed up and left on Monday.

22 I credit Maffia's version of events. Although Gilbert Almonte testified that he did not think Maffia returned to work after showing up the first day, his recollection was vague, uncertain and inconsistent with payroll records showing that Maffia worked on November 9. Meanwhile, Maffia was clear and detailed in his testimony, which was consistent with payroll records that established he worked on November 9. The incident was also more likely to be prominent in Maffia's mind than in the mind of Gilbert (who was dealing with, in his words, a hectic situation). [Tr. 2208] Further, as noted above, Catalano's position statement to the Region indicates that

Maffia was discharged after 1 day. This statement not only works as an admission that Maffia worked "one day," but also that his employment was affirmatively severed by Respondent HB for cause (i.e., Maffia was "discharged" for not working the previous day instead of abandoning his job).

23 On the record, Respondents' counsel stipulated that Gowon was a supervisor while employed by Respondent Seven Seas, but represented that Gowon left Seven Seas sometime after November 2015 and was not a supervisor thereafter. [Tr. 406.] The record did not otherwise confirm Gowon's departure or indicate when she left.

24 Spreadsheets of the A&P-Union Square employee roster list Ayanna Jordan as a deli clerk, but Diaz credibly testified without contradiction that Jordan was an assistant in the scanning department. [Tr. 629-630, 641-643.]

25 It is not entirely clear to me what Diaz meant by Gowon putting Erma "before" Silverio. The General Counsel represented in its brief that Gowon assigned Erma an earlier shift.

26 The Union handbilled at Albany Avenue or Greaves Lane on a regular basis through Christmas, and then continued more sporadically. [Tr. 601-604, 60-610, 1248-1250.]

27 Conti did not identify the last name of Munsee (spelled phonetically in the transcript), but a list of A&P employees at the Greaves Lane store includes a deli clerk named Monserrate Reyes. Conti identified Tony's last name as "Dufay" (spelled phonetically in the transcript). The list of A&P employees includes a meat cutter named Antonio Giuffre.

28 Albany Avenue payroll records do not contain hours worked. However, the schedule for the week ending January 30, 2016 indicates that Lyons was scheduled to work "40+4" hours and his gross pay the next pay date was $1,129.90, including payment of $150.06 at the "Sunday 1.5 rate." If Lyons worked 4 hours of overtime at time and a half on Sunday, his hourly rate calculates to $25.06. If you remove Lyon's overtime pay and assume the remainder reflected his pay for 40 hours of work during the week, his hourly rate calculates to $24.49. [Jt. 8.]

29 While questioning Sam Abed, the General Counsel indicated that two disciplinary records regarding Fiore were produced by the Respondents in response to a subpoena. However, no disciplinary records regarding Fiore were entered into evidence.

30 Weekly schedules refer to "Tony R" and payroll records show the addition of "Anthony Remo."

31 In the October 22 MOA, the Respondents indicated that part-time employees who average 30 hours per week would be offered healthcare coverage.

32 It is noteworthy that the Respondent ended the October 19 bargaining session by offering to hire all A&P employees other than seafood employees in stores where the seafood department was being eliminated, and Catalano began the October 21 bargaining session by confirming that proposal. This was a significant concession long sought by the Union and it would have been a dramatic reversal for Abondolo to propose a buyout that allowed Respondents not to hire A&P employees immediately after the Respondents finally conceded the point.

33 The Respondents contest that Respondent Key Food and the other Respondents are joint employers. However, as discussed below, I reject the Respondents' position in this regard.

34 The record does not indicate that the Union learned about the September 30 amendment to the APA before the APA was approved on October 21.

35 I do not adopt the General Counsel's contention that the Respondents were prohibited from setting initial terms because they did not announce, on some earlier date, the actual terms which were ultimately implemented. Case law does not establish that a successor is required to announce specific terms contemporaneously with an expression of intent to hire a majority of the predecessor's employees as opposed to a more general indication of its intent to set new terms at the time of hiring. *Banknote Corp. of America*, 315 NLRB 1041, 1043 (1994) (employer not perfectly clear successor where it notified unions of intent to establish initial terms and, "[s]ubsequently, specific anticipated changes were communicated to the [u]nions and to three of the prospective employees at their interviews). See also *Ridgewell's Inc.*, 334 NLRB 37 (2001). The Respondents properly advised the Union of terms they were willing to offer as those terms developed throughout negotiations. However, the Respondents were not entitled to implement those terms unilaterally, in advance of an agreement or impasse, because succession was perfectly clear.

36 As discussed in the fact section of this brief (supra fn. 22), I find that Maffia was laid off or discharged and did not abandon his job.

37 The complaint alleged that, on September 6, Frank Almonte threatened employees with unspecified reprisals because they engaged in Union activity. In its brief, the General Counsel contends that the statements by Almonte constitute unlawful interrogation instead of an unlawful threat.

38 Respondent HB did not present a *Wright Line* defense since Gilbert Almonte denied that Respondent HB had anything to do with Quiles' severance from A&P (a denial I do not credit).

39 Likewise, in *Hagar Management Corp.*, 313 NLRB 438, 442 (1993), the Board adopted a judge's finding that certain employees were laid off in order to avoid the burden of paying them wages pursuant to a union contract.

40 The DC circuit found *Vantage Petroleum* controlling and refused to enforce the Board's *Sierra Realty* decision on the grounds that the employer did, in fact, have reason to believe that the predecessor's employees would be unwilling to accept lower wages. See *Sierra Realty Corp. v. NLRB,* 82 F.3d at 497.

41 Collective-bargaining agreements often contain provisions that require layoffs to be conducted by seniority rather than other criteria such as wage rates.

42 Haenlein had the best and most specific recollection as to when Castillo and Monegro were hired.

43 Rather, the evidence strongly suggests that Maffia was laid off (or discharged) because he was suspected of engaging in a work stoppage called by the Union. Maffia came to work for Respondent HB on November 9 and worked a full day without incident. He was absent on November 10 and was laid off on the morning of November 11. Gilbert Almonte believed that Maffia left without working on November 10 because the Union told him to do so. Catalano submitted a position statement to the Region that stated, "Richard Maffia was hired by HB Food Corp. for one day" and "was thereafter terminated by HB Food Corp. ...." Since nothing happened from the time Maffia worked uneventfully on November 9 to the time he was laid off before work on November 11, except Maffia's absence from work on November 10 (which Gilbert attributes to a work stoppage called by the Union), it follows that Maffia was discharged because he was suspected of participating in a Union work stoppage. This conclusion is further supported by Catalano's comments at subsequent bargaining sessions which suggested that the Respondents were hostile toward employees who participated in union job actions. It is unclear to me why participation in a union work stoppage would not constitute protected activity and a layoff or discharge on that basis would not be a violation of Sec. 8(a)(3) and (1). *Industrial Hard Chrome, Ltd.*, 352 NLRB 298 (2008); *Kapiolani Hosp.*, 231 NLRB 34, 42-43 (1977); *Nanticoke Homes, Inc.*, 261 NLRB 736, 749 (1982). Notably, whether Maffia actually engaged in a work stoppage is irrelevant since it is unlawful to sever an employee who is suspected of engaging in a protected work stoppage even if that suspicion turns out to be incorrect and the employee did not actually engaged in any protected activity. *White Electrical Construction Co.,* 345 NLRB 1095 (2005) (employer "violated Section 8(a)(1) by discharging [employee]... in the mistaken belief that he had engaged in a work stoppage,..."). See also *Wallingford's Favorite Chicken, LLC*, 359 NLRB No. 16 (2012) (not reported in Board volumes); *Hamilton Avnet Electronics*, 240 NLRB 781, 791 (1979); *Metropolitan Orthopedic Assn.*, 237 NLRB 427 (1978); Cello-*Foil Products, Inc.*, 171 NLRB 1189, 1193 (1968). However, the General Counsel has not contended that Maffia was laid off because he engaged in a union work stoppage and none of the parties briefed such a theory. Accordingly, I will not make a finding to that effect and will leave it to the General Counsel to decide whether to take exceptions and brief the issue to the Board.

44 Although Respondent Greaves Lane may have been aware of Conti's handbilling and retained him thereafter, I do not find that sufficient to negate the General Counsel's prima facie case. An employer may not be in a situation to deplete its work force by severing all employee handbillers. The record established by a preponderance of the evidence that Venditti was laid off, at least in part, because of his union activities.

45 Sam Abed had a conversation with Abondolo the previous day in which Sam agreed to discuss a resolution of any outstanding issues with the Union and Abondolo agreed to stop handbilling.

46 The Respondents had not adopted the A&P contracts and the MOA was not in effect, but the terms and conditions of employment (including wage rates) carried over from the Pathmark contract as a matter of statute. See *Cadillac Asphalt Paving Co.*, 349 NLRB 6 (2007). Fiore was entitled to request that Respondent Albany Avenue abide by those terms.

47 As discussed in previous section of this decision, it is unlawful for an employer to discriminate against an employee because (regardless of any protected communication regarding the issue) he/she is or was earning a contractual wage rate. See *Hagar*

Management Corp., 313 NLRB 438, 442 (1993). It is noteworthy that Sam Abed told Conti he was being removed from the Sunday schedule at Greaves Lane in favor of another employee, Musa, because Musa did not insist upon being paid overtime. Conti also testified that he was ultimately "promoted" to the meat manager position at Greaves Lane without an increase in his wage rate. These events indicate that Respondent HB favored employees (unlike Fiore) who did not insist upon and receive their proper pay (as reflected in the Pathmark contract).

48 Floral Manager Tameka Jones was not hired and the record does not indicate that she was replaced. The record also does not necessarily indicate that she could have performed the job of another employee who was hired by Respondent Seven Seas. Accordingly, it is arguable that the allegations regarding Jones is more aptly classified as a refusal-to-consider-for-hire than a refusal-to-hire, with a corresponding difference in the remedy. However, this can be addressed in a compliance proceeding, if necessary.

49 The Respondents assert in their brief that evidence of union activity by many of the alleged discriminatees is based exclusively on hearsay. I reject this assertion. Monier and the stewards testified that they raised certain employee complaints to Gowon's attention. Although some of these employees did not testify, the General Counsel's evidence is not hearsay. Monier and the stewards have personal knowledge of and testified to the union activity they engaged in during discussions with a supervisor on behalf of alleged discriminatees. It is unlawful for an employer to discriminate against an employee because a union representative raised a contractual issue on behalf of an employee even if the employee does not testify and the employer has no knowledge of the employees' protected discussions with the Union (which gave rise to the Union's complaints).

50 Interestingly, as noted above, the General Counsel attributes the Respondents hiring decisions in part to employees' wage rates, which in my opinion would constitute a valid non-discriminatory basis for such decisions. However, Respondent Seven Seas did not assert and Pat Conte did not testify that employees' respective wages had anything to do with hiring decisions. Accordingly, it is not a basis for a *Wright Line* defense.

51 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

52 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

53 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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APPENDIX A

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

***27** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not coercively question you about your union activities.

We will not refuse to hire you, lay you off, cause a different employer to lay you off or otherwise discriminate against you because you have engaged in union activities.

We will not lay you off or otherwise unilaterally change your wages, hours and other terms and conditions of employment without notifying and, upon request, bargaining with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) regarding the decision.

We will not fail and refuse to reinstate you if you have been unlawfully laid off.

We will not fail and refuse to meet and bargain with the Union for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

We will, within 14 days from the date of this Order, offer full reinstatement to Khadisha Diaz, Richard Maffia, and Venus Nepay to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will make Khadisha Diaz, Richard Maffia, Venus Nepay, and Nelson Quiles whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will compensate Khadisha Diaz, Richard Maffia, Venus Nepay, and Nelson Quiles for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Khadisha Diaz, Richard Maffia, and Venus Nepay, and we will, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

Key Food Stores Co-Operative, Inc. and HB 84 Food Corp., Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
***28** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not lay you off or otherwise discriminate against you because you have engaged in union activities.

We will not lay you off, reduce your work days or otherwise unilaterally change your wages, hours and other terms and conditions of employment without notifying and, upon request, bargaining with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) regarding the decision.

We will not fail and refuse to reinstate you if you have been unlawfully laid off.

We will not fail and refuse to meet and bargain with the Union for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

We will rescind the reduction of your work days from six to five days per week.

We will, within 14 days from the date of this Order, offer full reinstatement to Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will make Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will make whole all unit employees for any loss of earnings and other benefits resulting from the reduction of their work days.

We will compensate any employee receiving a backpay award for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoffs of Debra Abruzzese, Gina Cammarano, Michael Fischetti, and Anthony Venditti, and we will, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

Key Food Stores Co-Operative, Inc. and Greaves Lane Meat LLC, Joint Employers

***29** The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not lay you off, discharge you, reduce your days of work, reduce your hours of work, reduce your wage rate or otherwise discriminate against you because you have engaged in union activities.

We will not lay you off, reduce your days of work, reduce your hours of work, reduce your wage rate or otherwise unilaterally change your wages, hours and other terms and conditions of employment without notifying and, upon request, bargaining with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) regarding the decision.

We will not fail and refuse to reinstate you if you have been unlawfully laid off.

We will not fail and refuse to meet and bargain with the Union for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will, within 14 days from the date of this Order, offer full reinstatement to Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

We will rescind unilateral and/or discriminatory reductions in the work days, work hours and wage rates of unit employees.

We will make Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and we will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will make Robert Jenzen and Stephen Fiore whole for any loss of earnings and other benefits resulting from the reductions of their work days, work hours and/or wage rates.

We will compensate Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

***30** We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful demotion of Stephen Fiore and the unlawful layoffs of Joseph Batiste, Kalvin Harris, Robert Jenzen and Stephen Fiore, and we will, within 3 days thereafter, notify them in writing that this has been done and that these adverse employment actions will not be used against them in any way.

Key Food Stores Co-Operative, Inc. and 1525 Albany Avenue Meat LLC, Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX D

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not refuse to hire you or otherwise discriminate against you because you have engaged in union activities.

We will not lay you off or otherwise unilaterally change your wages, hours and other terms and conditions of employment without notifying and, upon request, bargaining with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) regarding the decision.

We will not fail and refuse to reinstate you if you have been unlawfully laid off.

We will not fail and refuse to meet and bargain with the Union for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

We will, within 14 days from the date of this Order, offer instatement to Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Maria Ortega, Elena Pagan, and Rosa Silverio to their former jobs with The Great Atlantic & Pacific Tea Company or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

We will, within 14 days from the date of this Order, offer reinstatement to Ayanna Jordan to her former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

We will make Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio whole for any loss of earnings and other benefits resulting from our refusal to hire or lay them off, less any net interim earnings, plus interest, and

***31** We will also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

We will compensate Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Itturalde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire or layoff of Jose Carlos Colon, Juana Diaz, Keesha Fields, Madeline Gomez, Dena Iturralde, Tamika Jones, Ayanna Jordan, Maria Ortega, Elena Pagan, and Rosa Silverio, and we will, within 3 days thereafter, notify them in writing that this has been done and that the refusals-to-hire and layoffs will not be used against them in any way.

Key Food Stores Co-Operative, Inc. and Seven Seas Union Square, LLC, Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX E

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not lay you off or otherwise unilaterally change your wages, hours and other terms and conditions of employment without notifying and, upon request, bargaining with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) regarding the decision.

We will not fail and refuse to reinstate you if you have been unlawfully laid off.

We will not fail and refuse to meet and bargain with the Union for a collective-bargaining agreement.

We will not bypass the Union, your exclusive bargaining representative, and deal directly with you regarding your wages, hours, and other terms and conditions of employment, including severance and the signing of a severance agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

***32** We will upon request by the Union, rescind the severance agreement of Mariano Rosado.

We will, within 14 days from the date of this Order, offer full reinstatement to Mariano Rosado to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

We will make Mariano Rosado whole for any loss of earnings and other benefits resulting from their layoffs, less any net interim earnings, plus interest, and we will also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

We will compensate Mariano Rosado for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and we will file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for the employee.

We will, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff of Mariano Rosado, and we will, within 3 days thereafter, notify him in writing that this has been done and that the layoffs will not be used against him in any way.

Key Food Stores Co-Operative, Inc. and Key Food CS2, LLC d/b/a Food Universe, Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX F

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to meet and bargain with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

Key Food Stores Co-Operative, Inc. and Riverdale Grocers LLC, Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX G

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
***33** The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to meet and bargain with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

Key Food Stores Co-Operative, Inc. and JAR 259 Food Corp., Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX H

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to meet and bargain with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

Key Food Stores Co-Operative, Inc. and Park Plaza Food Corp., Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX I

Notice To Employees

Posted by Order of the National Labor Relations Board

An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.
FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

***34** Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We will not fail and refuse to meet and bargain with the United Food and Commercial Workers Union, Local 342, AFL-CIO (the Union) for a collective-bargaining agreement.

We will not in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

We will offer dates to meet and bargain with the Union for a collective-bargaining agreement.

Key Food Stores Co-Operative, Inc. and Paramount Supermarkets, Inc., Joint Employers

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-164058 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

368 NLRB No. 92 (N.L.R.B.), 2019 L.R.R.M. (BNA) 395185, 2018-19 NLRB Dec. P 16599, 2019 WL 5265170

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